

# Consultation on the Definition of a Charity

A report to the Treasurer

Board of Taxation

December 2003

© Commonwealth of Australia 2004

ISBN 0 642 74224 3

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth available from the Department of Communications, Information Technology and the Arts. Requests and inquiries concerning reproduction and rights should be addressed to:

The Commonwealth Copyright Administration  
Intellectual Property Branch  
Department of Communications, Information Technology and the Arts  
GPO Box 2154  
CANBERRA ACT 2601  
Or posted at:  
<http://www.dcita.gov.au/cca>.

# Contents

---

<b>Chapter 1: Summary of recommendations .....</b>	<b>1</b>
Disqualifying purpose (subsection 8(2)) .....	1
Core definition (section 4); Not-for-profit entities (section 5); and Dominant purpose (section 6) .....	2
Serious offence (paragraph 4(1)(e)).....	3
Public benefit: numerically negligible (subsection 7(2)) .....	3
Altruism .....	3
Administrative burden .....	3
<b>Chapter 2: Overview.....</b>	<b>5</b>
The Terms of Reference .....	5
The meaning of workability .....	6
How the consultation was conducted.....	6
The Government’s response to the Charities Definition Inquiry.....	7
Structure of report.....	8
The contemporary shape of the charitable sector .....	9
Overview of issues.....	10
<b>Chapter 3: Advocacy and disqualifying purpose .....</b>	<b>13</b>
Introduction.....	13
Overview of submissions .....	13
Board assessment.....	17
Recommendations.....	21
<b>Chapter 4: Charitable structure, core definition, not-for-profit entities,     dominant purpose .....</b>	<b>23</b>
Introduction.....	24
Overview of submissions .....	24
Board assessment.....	29
Recommendations.....	30
<b>Chapter 5: Serious offence .....</b>	<b>31</b>
Introduction.....	31
Overview of submissions .....	31
Board assessment.....	33
Recommendation.....	33

<b>Chapter 6: Public benefit and other definitional issues .....</b>	<b>35</b>
Introduction.....	35
Overview of submissions .....	35
Board assessment.....	39
Recommendation.....	39
<b>Chapter 7: Altruism .....</b>	<b>41</b>
Introduction.....	41
Overview of submissions .....	41
Board assessment.....	43
Recommendation.....	43
<b>Chapter 8: Administrative burden .....</b>	<b>45</b>
Introduction.....	45
Overview of submissions .....	45
Board assessment.....	46
Recommendations.....	46
<b>Chapter 9: Other views on charitable sector reform .....</b>	<b>47</b>
Introduction.....	47
The draft Bill should be a first step in a program of legislation to rationalise the regulation of the sector .....	47
Interpretation issues .....	48
Constitutional validity .....	49
<b>Appendices</b>	
Appendix 1: Charities Bill 2003 .....	51
Appendix 2: Explanatory Material .....	65
Appendix 3: Group meetings held.....	91
Appendix 4: Submissions received .....	93
Appendix 5: Members and Charter of the Board of Taxation, conflict of interest declaration .....	105
Appendix 6: Glossary of abbreviations.....	109
Appendix 7: ATO Minute No: 480/2003.....	111

# Chapter 1: Summary of recommendations

---

The Board has examined all matters relating to its brief and has considered the many submissions it has received. It believes the following recommendations would enhance the workability of the draft Charities Bill 2003 (the draft Bill) and the Explanatory Material (EM).

## Disqualifying purpose (subsection 8(2))

3.44 The Board recommends that the Government provide greater clarity to the sector on how charitable bodies may be affected by the interrelationship between subsection 8(2) and paragraphs 4(1)(a), (b) and (c).

3.45 The Board makes the following recommendations in the event that the Government decides to retain subsection 8(2) in substantially its current form:

- (a) The Board recommends that the EM and if necessary the draft Bill be revised to clarify how the provisions of the draft Bill are intended to operate, and to deal with the following issues in particular:
  - The discrepancy between the words of the draft Bill, which maintain a clear distinction between activities and purposes, and the view expressed in the EM that charitable purpose may be determined by an examination of activities and other matters as well as purposes.
  - The tests that will be applied to determine whether particular activities have become purposes in their own right.<sup>1</sup>
- (b) The Board recommends that the draft Bill be amended to clarify whether ‘cause’ as used in paragraph 8(2)(a) is intended to mean ‘political cause’ or to have a more general application.
- (c) The Board recommends that consideration be given to whether paragraph 8(2)(b) should also refer to opposing a candidate for political office.

---

1 The Board notes that, under the draft Bill, the tests ‘ancillary or incidental’ apply only when these activities have become purposes – they are not a test for when an activity becomes a purpose. Refer to paragraph 3.39.

(d) The Board recommends that the EM be revised to emphasise that subsection 8(2) applies only to:

- the purpose of advocating a political party or [a political] cause;
- the purpose of supporting [or opposing] a candidate for political office;
- the purpose of attempting to change the law or government policy;

rather than advocacy as this word is commonly understood in the community.

## Core definition (section 4); Not-for-profit entities (section 5); and Dominant purpose (section 6)

4.33 The Board recommends that, to improve the workability of the Bill, some clarity be provided in the Bill as to whether or not peak bodies would generally qualify as charities.

4.34 The Board recommends that the draft Bill should be amended to provide a clear definition of ‘government body’, including whether local government (currently omitted) is included, and a clear definition of ‘controlled by government’.

4.35 The Board recommends that consideration be given to addressing the problems that may be caused for testamentary trusts by subsection 7(1).

4.36 The Board recommends that the meaning of ‘partnership’ in paragraph 4(1)(f) be clarified in the EM or by the insertion of a note in the draft Bill along the following lines:

‘Note: Under paragraph 4(1)(f) of this Act, some entities covered by the *Income Tax Assessment Act 1997* are not able to be recognised as charities, charitable institutions or any other kind of charitable bodies.’

4.37 The Board recommends that the words ‘small scale’ be removed from the EM’s example of ‘ancillary or incidental’ activities as it does not appear to be supported by the draft Bill, and further that the intent of paragraph 4(1)(c) be clarified in the EM or the draft Bill.

4.38 The Board recommends that the relationship between paragraph 4(1)(c) and section 6 be clarified, possibly by the inclusion of a new subsection 6(3) along the following lines:

‘(3) If an entity has a dominant purpose as described in subsection (1) or (2), then an activity engaged in by the entity furthers or is in aid of its dominant purpose if it furthers or is in aid of any of the purposes covered by that subsection.’

## Serious offence (paragraph 4(1)(e))

5.15 The Board notes that subsection 8(1) would ensure that an entity with an unlawful purpose was not entitled to charitable status, and recommends that paragraph 4(1)(e) be removed, so that an instance of unlawful conduct would not disqualify an entity from obtaining or retaining charitable status.

## Public benefit: numerically negligible (subsection 7(2))

6.25 The Board recommends that section 7 be amended to provide that 'sufficient section' is defined as one which is not 'numerically negligible' compared with the size of that part of the community to whom the purpose would be relevant.

## Altruism

7.16 The Board recommends that it is not necessary to require an entity's dominant charitable purpose to be altruistic as the public benefit test is adequate.

## Administrative burden

8.12 The Board recommends that:

- the practical application of the draft Bill should be the subject of a post-implementation review within two to three years of its implementation; and
- for the purposes of the post-implementation review, a base-line study of the current administrative burden should be started before the draft Bill is implemented.

8.13 The Board recommends that an education program and compliance tool-kit be provided by government to the charitable sector to accompany the enactment of the draft Bill.





## Chapter 2: Overview

---

### The Terms of Reference

2.1 On 22 July 2003, the Treasurer, the Hon. Peter Costello MP, asked the Board of Taxation (the Board) to consult with the charitable sector and to prepare a report advising him on the workability of the draft Charities Bill 2003 (the draft Bill) and the accompanying Explanatory Material (EM).

2.2 The draft Bill represents the Commonwealth's first legislative definition of a 'charity', which until now has been largely defined through the common law. The draft legislation forms a part of the Government's response to the Report of the Inquiry into the Definition of Charities and Related Organisations (the CDI), June 2001.<sup>1</sup>

2.3 The Treasurer forwarded the following Terms of Reference to the Board of Taxation on 22 July 2003 requesting that a report be submitted to him by 1 December 2003. The reporting date was subsequently extended to 19 December 2003.

#### **Consultation by the Board of Taxation on the definition of a charity**

1. The Government has announced that it will codify the existing common law meaning of a charity and expand it to encompass certain child care organisations, self-help bodies, and closed or contemplative religious orders.

Pursuant to this decision, the Board is to consult on the workability of the legislative definition of a charity proposed in the exposure draft Charities Bill 2003.

2. In addition, the Board should specifically consult on whether the public benefit test in the Charities Bill 2003 should require the dominant purpose of a charitable entity to be altruistic, as recommended by the Report of the Inquiry into the Definition of Charities and Related Organisations.
3. The Board should consult primarily with organisations intended to fall within the new definition of a charity.
4. The Board should consider views put forward and provide its recommendations in a report to the Government by 1 December 2003.

---

1 <http://www.cdi.gov.au>.

## The meaning of workability

2.4 The Board, in considering its brief, offered the following guidance to the sector to assist organisations prepare their submissions and to guide its own advice to the Treasurer. In order to assess the workability of the proposed legislation, the sector was asked whether the proposed legislative definition would:

- effectively implement the Government's policy as expressed in the Treasurer's Press Release No. 49, 29 August 2002 (PR No 49);
- provide greater clarity and transparency to charities;
- provide the flexibility to ensure the definition can adapt to the changing needs of society;
- give effect to the common law definition of a charity except where the meaning was deliberately expanded, for example to include not-for-profit child care, open and non-discriminatory self-help groups and closed or contemplative religious orders;
- have any effect on the level of administrative burden upon charities.

2.5 The Board did not consider workability to include:

- the administrative arrangements required of the Government to implement the definition;
- the degree of harmonisation with the laws of the States and Territories; or
- the scope of the new definition (for example, the issue of including certain child care organisations and self-help groups within the definition was dealt with in the CDI Report following the consideration of submissions from the charitable sector, and in the Government's response to the report contained in the Treasurer's Press Release (PR No 49)).

## How the consultation was conducted

2.6 The consultation was conducted by a Working Group of the Board comprising Ms Jane Schwager (chair), Mr John Bronger, Ms Hilary Penfold, QC and Mr Richard Warburton, with the assistance of the Board Secretariat. As part of its deliberations, the Board had the benefit of the views of its *ex officio* members: the Secretary to the Treasury, Dr Ken Henry; the Commissioner of Taxation, Mr Michael Carmody; and the First Parliamentary Counsel, Ms Hilary Penfold, QC. The *ex officio* Government members reserved their final views for advice to the Government. The Board was assisted by four consultants: Ms Denny Groth, Professor Myles McGregor-Lowndes, Ms Jane Pretty and Ms Marie Spencer. The Board is also grateful to Mallesons Stephen Jaques for providing the assistance of Mr Nicholas Vesic to the Working Group.

2.7 The timeframe for conducting group discussions, receiving and reviewing submissions and preparing the report by December 2003 was short. The consultation involved organisations and peak groups from across the sector including those dealing with welfare, legal services, children's services, housing, culture, education, the environment, health, indigenous affairs, ethnic affairs, overseas aid and religion. Lists of meetings held and submissions received are contained in Appendices 3 and 4.

2.8 The Board issued a press release announcing its brief and inviting organisations within the charitable sector to take part in its consultations. The Board called for submissions through advertisements in major daily newspapers in each State and Territory. Each of the 373 individuals and organisations that had made a submission to the CDI also received an invitation to make a submission.

2.9 To ensure that the consultation was as thorough as possible, the Board also met with key charitable bodies and representative groups and conducted group discussions in all State and Territory capitals. The groups, which were organised by peak organisations, enabled the Board to explain the Terms of Reference and obtain an early indication of the sector's response to the draft Bill.

2.10 To assist potential respondents, the Board made available the draft Bill and EM, the Board's Terms of Reference, the Board's consultation plan, a guide to making a submission, and a 'frequently asked questions' information paper.

2.11 The Board received 267 written submissions, including 10 confidential submissions. Each of these was reviewed to enable the Board to assess the perceived impact of the draft legislation.

## The Government's response to the Charities Definition Inquiry

2.12 The Treasurer announced the Government's response to the CDI Report in a Press Release (PR No 49). The Treasurer announced that '[T]he Government has decided to enact a legislative definition of charity for the purpose of the administration of Commonwealth laws and to adopt a majority of the Inquiry's recommendations for the definition.'

2.13 The Treasurer stated that the '[T]he legislative definition of a charity will closely follow the definition that has been determined by over four centuries of common law, but will provide greater clarity and transparency for charities. The details of the definition are attached. It will explicitly allow not-for-profit child care available to the public, self-help bodies that have open and non-discriminatory membership and closed or contemplative religious orders that offer prayerful intervention for the public, to be charities. It will provide certainty to those organisations operating in the sector while still providing the flexibility required to ensure the definition can adapt to the changing needs of society.' (PR No 49)

2.14 The announcement specifically noted that 'commercial purposes should not deny charitable status where such purposes further, or are in aid of, the dominant charitable purposes or where they are incidental or ancillary to the dominant charitable purposes.' (PR No 49)

2.15 The announcement also sets out elements of the proposed definition of a charity which, among other things, indicated that an entity must not have a dominant purpose of:

- advocating a political party or cause; or
- supporting a candidate for political office; or
- attempting to change the law or government policy. (PR No 49)

2.16 The Treasurer also noted that the Commonwealth's main requirement for a definition of a charity is to determine eligibility for tax relief but that the definition would also apply for all Commonwealth legislation. He also noted that he would be writing to each State and Territory Treasurer to gauge their interest in achieving harmonisation of laws defining charity.

## Structure of report

2.17 This chapter:

- describes the background to the draft legislation, including the Government's response to the CDI;
- provides an overview of some of the changes that are shaping the charitable sector;
- summarises the main issues raised by the sector in submissions and group discussions; and
- canvasses other views on charitable sector reform.

2.18 Chapters 3, 4, and 5 discuss the three major issues which the Board believes require further consideration if the draft Bill and EM are to provide the workability and flexibility intended by the Government. Chapter 3 addresses advocacy and disqualifying purpose, Chapter 4 addresses charitable structure and Chapter 5 addresses serious offence.

2.19 The remaining chapters address other issues related to the Board's brief. They include:

- Public benefit and other definitional issues (Chapter 6);
- Altruism (Chapter 7);
- Administrative burden (Chapter 8); and
- Other views on charitable sector reform (Chapter 9): a summary of concerns which may affect the workability and flexibility of the draft Bill but are outside the Terms of Reference of the Board.

## The contemporary shape of the charitable sector

2.20 A key test of workability of the draft definition is whether it provides greater clarity and transparency to the charitable sector and whether it is flexible enough to ensure the definition can adapt to the changing needs of society.

2.21 Charitable bodies and other not-for-profit organisations represent a sizeable segment of the Australian economy. The Australian Bureau of Statistics First National Accounts Report on the not-for-profit sector established that non-profit institutions contributed \$21 billion or 3.3 per cent to Australia's GDP in 1999-2000.<sup>2</sup> When volunteer services were valued and included, the contribution rose to \$30 billion or 4.7 per cent of GDP. Non-profit institutions employed 604,000 people, or 6.8 per cent of the total national figure, in 1999-2000.

2.22 There are around 45,600 charitable bodies registered with the Australian Taxation Office (ATO) for income tax exemption and/or Deductible Gift Recipient (DGR) status.<sup>3</sup> There are approximately 10,350 Public Benevolent Institutions (PBIs) endorsed by the ATO.<sup>4</sup> PBIs will continue to be defined by reference to the *Income Tax Assessment Act 1997* (ITAA 1997). However, at present all PBIs are regarded as charitable. There is thus a sector expectation that the new definition of a charity will have an indirect effect on PBIs.<sup>5</sup>

2.23 Charitable bodies have changed the way they work with disadvantaged groups.<sup>6</sup> A far greater emphasis is now given to supporting people to achieve economic independence — a key indicator of social wellbeing. This includes assisting people to gain the necessary support, confidence and skills to win jobs in a competitive employment market. Increasingly, charitable bodies are establishing social enterprises to address entrenched welfare dependence. Social enterprises adopt business practices and apply them to achieve social objectives. In its submission to the CDI, the Smith Family described social enterprise as any private activity, conducted in the public interest, organised with an entrepreneurial strategy, the main purpose of which is the attainment of certain social and economic goals, rather than the maximisation of profit.<sup>7</sup> In some cases, social enterprise is taking the form of innovative joint ventures between not-for-profit and for-profit organisations that do not fit the traditional model of social welfare delivery.

2.24 Charitable bodies have become major contractual partners with government in providing human services, sometimes taking on functions from governments, such as

---

2 Australian Bureau of Statistics, *Non-Profit Institutions Satellite Account*, Canberra, (Cat No.5256.0) 28 November 2002.

3 The statistics in paragraph 2.22 were provided by the Australian Taxation Office, 25 November 2003.

4 ATO, SB NP OLAP Cubes (1 December 2003).

5 For the purposes of Division 50 of the ITAA 1997, a public benevolent institution which is an entity is a charitable institution — paragraph 24 of Taxation Ruling TR 2003/5: Income tax and Fringe benefits tax: public benevolent institutions.

6 Mark Lyons, *Third Sector: The Contribution of Non-profit and cooperative enterprises in Australia*, Allen & Unwin, Sydney, 2001, Chapter 24.

7 *Report of the Inquiry into the Definition of Charities and Related Organisations*, Canberra, June, 2001, pp 63-64. See also <http://www.cdi.gov.au>

through the Jobs Network. Charitable bodies also play an important role in advising government and helping to develop policy.<sup>8</sup>

2.25 As the charitable sector's role has become more complex and the administrative and accountability requirements more onerous, there is an increased requirement to develop greater expertise in policy, research, education and advocacy alongside improved accountability systems in finance, human resources and information technology. Charitable bodies have also emulated other sectors by establishing peak bodies or separate entities to undertake these functions more efficiently.<sup>9</sup>

2.26 Finally, the call on their skills, innovation and services continues to eclipse the funds available to charitable bodies through the traditional mix of sources. As the Treasurer's Press Release (PR No 49) recognised, many<sup>10</sup> charitable bodies now support their charitable purpose through commercial operations.

## Overview of issues

2.27 Many respondents welcomed the concept of a legislative definition to provide clarity and certainty to the sector. Some suggested minor amendments. A small number of submissions supported the legislation in its entirety. However, a significant majority of the comments received by the Board suggested that the draft Bill and EM require amendment if the Bill is to be workable, clear and flexible. Submissions focused on a wide range of issues but three issues were dominant and are summarised below.

2.28 **Disqualifying purpose and advocacy:** The main concern is that the draft definition appears to limit the amount of advocacy a charity can undertake and still retain charitable status. The 'disqualifying purpose' clause was regarded widely as more restrictive than the common law, the CDI Report recommendation or the approach proposed in the Treasurer's Press Release (PR No 49).

2.29 **Core definition:** Many respondents, particularly those representing some of the large religious organisations, were concerned that the draft definition does not provide clarity about the many different entities formed to more efficiently further the charitable purposes of organisations.

2.30 Both the common law and the draft definition exclude government bodies from having charitable status. Determining whether an entity is controlled by government is critically important, particularly for bodies operating in the health and emergency services areas. The common law is far from clear on what constitutes government control and cannot be applied easily to the complex arrangements of many State and local government created bodies.

2.31 **Serious offence:** Paragraph 4(1)(e) would put charitable bodies at risk of losing their charitable status if they engage in, or have engaged in, conduct that amounts to a serious

---

8 Mark Lyons, op cit, Chapter 21.

9 Mark Lyons, op cit, Chapter 25.

10 Mark Lyons, op cit, Chapters 16 and 17.

offence — even if there is no conviction. This provision does not reflect the common law and there is wide support for its removal.

## Other views on charitable sector reform

2.32 **The need for wider regulatory reform:** The Board received many submissions arguing for further reform to simplify the complex regulatory system in which charitable bodies operate.

2.33 Many submissions also echoed those received by the CDI which argued that the ATO was an inappropriate regulator for the sector and that an independent administrative body should be established. There was strong support for the CDI's concept of a rationalised definitional framework to incorporate charitable bodies, PBIs and DGR status. The Board appreciates that this issue falls outside of its Terms of Reference, and is a matter of policy for government, but notes that the complexity of the overall framework may add to the administrative burden on charitable bodies.

2.34 **An alternative to codification:** The Board also notes an alternative approach to enacting the Bill as drafted, which received strong support from a small number of carefully considered submissions. They argued that the Government should consider retaining the common law approach, and legislate only for those changes to the common law position that the Government expressly intends to make. (Freehills; Catholic Church in Australia; Philanthropy Australia)

2.35 This approach would involve minor legislative changes to recognise new categories within the charitable sector, such as self-help groups and closed or contemplative religious orders, as well as additional charitable purposes including child care, the advancement of the natural environment and the advancement of human rights. Legislation would also be needed to address the public benefit test requirement. This approach has precedents in the UK definition of charity and the Australian States' definitions of recreational charities.<sup>11</sup>

2.36 Submissions noted that this approach would avoid attempting to codify many of the anomalies and confusions inherent in the common law. It would also retain the flexibility of the common law. It might also avoid costly litigation which may occur in order to resolve issues emerging as a result of codification.

2.37 The Board has also noted the recently proposed reforms to the charitable sector in other countries operating within common law jurisdictions such as the United Kingdom and New Zealand.

---

11 Subsection 103(2) of the *Trusts Act 1973* (QLD); subsection 69C(1) of the *Trustee Act 1936* (SA); subsection 5(1) of the *Charitable Trusts Act 1962* (WA) and subsection 4(1) of the *Variation of Trusts Act 1994* (Tas); *Recreational Charities Act 1958* (UK); and subsection 61A(3) of the *Charitable Trusts Act 1957* (NZ) .







## Chapter 3: Advocacy and disqualifying purpose

---

Charities Bill 2003: Relevant sections:

### Section 4: **Core definition**

(1) A reference in any Act to a charity, to a charitable institution or to any other kind of charitable body, is a reference to an entity that:

(d) does not have a disqualifying purpose;

### Section 8: **Disqualifying purposes**

(2) Any of these purposes is a *disqualifying purpose*:

(a) the purpose of advocating a political party or cause;

(b) the purpose of supporting a candidate for political office;

(c) the purpose of attempting to change the law or government policy;

if it is, either on its own or when taken together with one or both of the other of these purposes, more than ancillary or incidental to the other purposes of the entity concerned.

## Introduction

3.1 Section 8 of the draft Bill provides that certain kinds of purposes will disqualify an entity from recognition as a charitable body. A purpose of engaging in activities that are unlawful is always a disqualifying purpose (subsection 8(1)). Certain kinds of purposes, listed in subsection 8(2), will be disqualifying purposes if they are more than ancillary or incidental to the entity's other purposes.

3.2 This section has proved to be the most controversial section of the draft Bill. Concerns about section 8 reflect the view that the section may operate to limit the advocacy activities of charitable bodies. Respondents saw this possibility as significant because of the widely-expressed view that advocacy is of vital importance to the operations of the modern charitable sector.

## Overview of submissions

3.3 Submissions revealed a widely-held concern that subsection 8(2) of the draft Bill, read in light of the EM, would operate to exclude from the definition of a charity a body whose advocacy activities were more than ancillary or incidental to its charitable purposes. Another view expressed was that subsection 8(2) will encourage charities to adopt ancillary or incidental purposes in their constituent documents and to engage in advocacy activities at an increased level.

3.4 This concern was not significant in relation to the purposes described in paragraphs 8(2)(a) and (b). The majority of submissions agreed that charitable bodies should not be involved in 'advocating a political party' or 'supporting a candidate for political

office', provided these provisions did not impinge on their freedom to comment on party platforms at election times if policies had a bearing on their beneficiaries.

3.5 However, respondents were very concerned about the effect of the draft Bill on the advocacy activities described in paragraph 8(2)(c) ('attempting to change the law or government policy'). Many respondents felt that, having regard to the central role of advocacy in the work of the modern charitable sector, the draft Bill would be unworkable if it operated to restrict their advocacy work beyond the current common law position. In arguing that the draft Bill should be confined so as not to impose any such restrictions, respondents raised the following major concerns about section 8:

- that it may not reflect the common law;
- that there is confusion about the distinction between the terms 'purpose' and 'activity' as they relate to advocacy or 'attempting to change the law or government policy';
- that there is uncertainty about the way in which the terms 'ancillary or incidental' are to be measured, and by whom, irrespective of whether they relate to 'purpose' or 'activity'.

3.6 Two other drafting issues were raised in submissions:

- Paragraph 8(2)(a) refers to 'advocating a political party or cause'; some respondents queried whether the paragraph should be read as referring to 'advocating a political party or a **political** cause', or whether 'cause' was intended to have an unqualified meaning. If 'cause' is to be read as unqualified, respondents were concerned that this paragraph, like paragraph 8(2)(c), would inappropriately constrain their freedom to engage in advocacy work.
- Paragraph 8(2)(b) refers to 'supporting a candidate for political office'; some respondents queried whether this reflected a drafting oversight and should in fact also extend to **opposing** a candidate for political office.

3.7 Many submissions expressed the view that advocacy activities are central to the work of the modern charitable sector. A number of submissions argued that the draft Bill should acknowledge the role of advocacy to modern charities positively, rather than refer to it in the negative as a 'disqualifying purpose'. They also proposed that public advocacy should be clearly distinguished from partisan or party-political advocacy.

3.8 The concerns expressed in submissions were generally consistent with the CDI approach to advocacy:

'Non party-political purposes or activities such as advocating on behalf of their causes or needs, contributing to the development or implementation of public policy, entering into the public debate, or seeking to change a particular law or public policy, should be assessed against the same principles as other purposes and activities. The principles recommended by the Committee are that to be a charity an entity's dominant purposes must be charitable and any other purposes must further, or be in aid of, the charitable purposes or be incidental or ancillary to them.' (CDI p 218)

3.9 Some submissions stated that subsection 8(2) might place an unjustifiable burden on the implied constitutional right to freedom of communication on matters of government and politics.

### Section 8 may diverge from the common law

3.10 Many submissions suggested that section 8 of the draft Bill did not codify the common law as intended. In principle, respondents favoured the approach taken in the attachment to the Treasurer's Press Release (PR No 49). That definition did not refer to a disqualifying clause but rather stated that an entity must not have a dominant purpose of attempting to change the law or government policy. 'Although there is not a great deal of difference between the two formulations, the reference to not having a dominant political purpose appears to better reflect the existing case law'. (Ann O'Connell)

3.11 Other submissions noted that the wording of section 8 appears to reverse the onus of proof and thus differs from the common law. For example, it was noted that the Bill in fact appears to reverse the onus of proof through its choice of language – that is, the use of 'disqualifying purpose' has perhaps unintentionally given the impression that advocacy is not a desirable activity for a charity unless it is a minor role.

### Distinction between 'purpose' and 'activity'

3.12 Paragraph 8(2)(c) refers to the 'disqualifying purpose' of attempting to change the law or government policy. It does not refer to 'activity'. However, the EM at paragraph 1.32 indicates that 'activities' as well as purpose will be assessed when determining an entity's dominant purpose.

3.13 Conflation of 'purpose' and 'activity' (as well as the confusion about 'ancillary' and 'incidental' mentioned below) could result in a narrow interpretation of how much advocacy a charitable body is entitled to undertake without jeopardising its charitable status. Some submissions suggested that charitable bodies might respond to the lack of clarity by limiting their advocacy activities, to the detriment of their beneficiaries, rather than jeopardise their charitable status.

### 'Ancillary or incidental' require clearer definition

3.14 Many submissions held that the term 'ancillary or incidental' was vague and confusing. The EM, at Example 1.1, appears to equate the term with 'small scale'. Respondents argued that this is more restrictive than either the common law or the ATO's current approach.

3.15 Definitive guidance in the draft Bill and EM would help ensure consistency in assessing eligibility for taxation concessions. 'The ATO through their own submission to the [Charities Definition] Inquiry recognised the difficulty of their interpretative task in the absence of clearly defined guidelines.' (Anglicare Australia)

3.16 Many respondents were unsure how their advocacy activities would be treated or indeed which activities would be classified as 'attempting to change the law or government policy'. '[A]dvocacy, whether for an individual client, a group of clients, a local community or a group of not for profit organisations is generally a seamless extension of human services delivery and community development in 2003 Australia.' (NCOSS)

3.17 Respondents inferred that they would need to keep more detailed records on their purposes to substantiate that their purposes had not crossed the boundary of being ‘more than ancillary or incidental to the other purposes of the entity concerned’. This would increase administrative costs and necessitate a consistent approach to recording activities. ‘If charities are required to keep detailed records of their advocacy work and allocate costs and expenses devoted to this work for the purposes of auditing by the ATO, an audit system would need to be developed so that [the] new measure is applied uniformly across the sector.’ (Cancer Council Victoria)

### The centrality of advocacy to the modern charitable sector

3.18 A number of organisations submitted that advocacy is of particular importance in achieving their charitable purpose and, as such, might not meet the test of ‘ancillary or incidental’. Included among these were disability organisations, welfare rights and community legal centres, peak bodies, environmental groups and human rights organisations.

#### Disability organisations

3.19 Organisations providing disability services are involved intensively in advocacy to achieve their charitable purpose. For example, the Disability Justice Advocacy submitted that it receives funding from government under the *Disability Services Act 1986* (Cth) to undertake 70 per cent advocacy on behalf of individuals and 30 per cent systemic advocacy. Rather than just ‘helping people with disabilities step over or around walls in society’, advocacy focused on ‘removing those walls’ to ensure equal access to services and facilities across the community. Representation by the disability sector had thus played a large role in the introduction of anti-discrimination legislation and non-discriminatory government policies. (Royal Blind Society)

#### Welfare rights and community legal centres

3.20 Submissions from welfare rights and community legal centres claimed that one of their major roles is to undertake systemic advocacy if particular laws or government policies have an adverse or disproportionate effect on certain groups of clients. Some felt there may be a conflict between the effect of the draft Bill when enacted and some funding agreements which require that legal centres undertake test case litigation and provide critical input into law and policy proposals. (Caxton Legal Centre)

#### Peak bodies

3.21 Peak bodies undertake research, policy and advocacy roles on behalf of different segments of the charitable sector. The Government funds a number of peak bodies to represent their sectors. It was suggested that paragraph 8(2)(c) would lack flexibility if a peak body’s specialist advocacy activities were construed as being a purpose of attempting to change the law or government policy that was more than ‘ancillary or incidental’. (ACOSS)

#### Environmental organisations

3.22 Environmental groups emphasised the importance of advocacy in achieving their charitable purposes. A submission referring to the ACF case pointed out that, while a campaign of tree-planting might be a strategy to address the problem of salinity, controlling land-clearing through legislation had proved to be far more effective. Without major

advocacy work,<sup>1</sup> the objective of protecting and renewing the natural environment would be unachievable.

### Human rights organisations

3.23 The draft Bill and EM, taken together, might exclude human rights organisations from charitable status despite the explicit reference to ‘the promotion and protection of civil and human rights’ as an example of ‘other purposes beneficial to the community’. (EM paragraph 1.84)

3.24 A number of submissions argued that human rights organisations are by their very nature involved in significant advocacy for changes in law or policy. One noted that the concept of human rights is not static but rather has evolved over time. Charities may therefore find themselves ahead of the law and public opinion. Another thought it could be seen as contradictory to acknowledge civil and human rights as a ‘purpose(s) beneficial to the community’ (paragraph 10 (1)(g)) if such an organisation could be construed as having a disqualifying purpose because it sought to protect those rights through a change in the law or government policy.

3.25 Overseas aid organisations noted that they cannot risk the safety of their field workers by taking an overt advocacy role where there is considerable civil unrest and violence. Therefore there is a need for specialist organisations not connected with on-the-ground charitable work. However, organisations with only a specialist advocacy role, for example human rights organisations, might be disqualified from charitable status.

3.26 There was also uncertainty about whether explicit reference to advocacy in constituent documents could be interpreted as a purpose that was ‘more than ancillary or incidental’. UNICEF Australia noted that its parent body requires it to advocate on behalf of children’s rights.

### Constitutional validity

3.27 Several submissions raised a concern that the draft definition may be unconstitutional. (The Federation of Community Legal Centres (Victoria) Incorporated; Professor Michael Chesterman). ‘[I]t could be considered that the Draft Bill, particularly if it does prohibit a charity from advocating a “political cause” [paragraph 8(2)(a)], would impose an unjustifiable burden on freedom of political expression. This could lead to its invalidity under the *Commonwealth Constitution*.’ (The Federation of Community Legal Centres (Victoria) Incorporated, citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520). This issue, which is discussed further at paragraphs 9.11-9.13, is a matter for specialist legal advice.

### Board assessment

#### Does section 8 of the draft Bill reflect the common law?

3.28 The rationale for introducing a legislative definition is to provide clarity and certainty to the sector where case law has not. If the legislation does no more than state the common

---

1 *Australian Conservation Foundation Inc v Commissioner of State Revenue* [2002] VCAT 1491.

law, it is hardly surprising that there are different views on whether the draft Bill accurately reflects the common law.

3.29 Australian superior courts have decided very few cases about the definition of a charitable body over many years of changing social and economic circumstances. As the CDI Report noted, '[t]he High Court has not been asked to decide on a case on charitable purposes since 1974 and has not heard a case on PBI since 1942.' (CDI p 35)

3.30 However, there have been some relatively recent cases in which other courts have had to consider the significance of certain kinds of 'political' activity in determining charitable purpose.

3.31 The CDI Report referred to the lower court case of *Public Trustee v Attorney-General of New South Wales*<sup>2</sup> in which Justice Santow noted that 'a trust may survive in Australia as charitable where the object is to introduce new law consistent with the way the law is tending. There is then no longer contrariety with an *established* policy of the law.'

3.32 Since the CDI Report was released, another lower court case, *Australian Conservation Foundation Inc v Commissioner of State Revenue*,<sup>3</sup> has indicated that the common law is still evolving. That case noted that '[i]t is now plain, if it was not before, that there is no law that says a charity can be proscribed merely because you can attach the epithet political to some of its activities: for a variety of reasons many charities nowadays will not be able to avoid conduct that may be said to be political. It is in my opinion clear that the ACF should *prima facie* be regarded as charitable and it would in my view be unacceptably unworldly if the ACF were to lose that status because of the misgivings expressed by some jurists (as it happens, Law Lords) in another context, in another hemisphere, and in another millennium.'

### Divergence between the orthodox approach to the common law and ATO practice

3.33 The CDI Report notes that Picarda's view is that '... the orthodox approach is that if an organisation's stated purposes are clearly charitable an activity test is not necessary. As noted in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* (1999): "It is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable character".' (CDI p 101)

3.34 The CDI Report notes that Dal Pont indicates that there are three main circumstances where it may be necessary to look to activity to substantiate the dominant charitable purpose:

---

2 *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600.

3 *Australian Conservation Foundation Inc v Commissioner of State Revenue* [2002] VCAT 1491.

- where there is doubt about whether a purpose stated in a governing document as the main purpose is in fact the main purpose. In this case the substance or facts of the matter will prevail over the formulation of the governing documents if the latter are proved to be misleading;
- where an entity's governing documents do not clearly indicate its main object. The activities may serve to indicate the relative weight to be accorded to each purpose; and
- where an entity lacks governing documents or where they are informal or incomplete. It is the nature of the entity as substantiated by its activities that will determine the entity's status.

(CDI p 101)

3.35 The ATO approach as described in the CDI Report adopts a more comprehensive approach where 'purpose' is determined by 'an objective weighing of all its features. They include its constitutive or governing documents, its activities, policies and plans, administration, finances, history and control, and any legislation governing its operation' (Draft Taxation Ruling Income tax and fringe benefits tax: charities 1999/D21 (TR 1999/D21)). The ATO has published a number of information packages using examples to assist the sector in determining and reviewing their status. However, the ATO gives little guidance as to the underlying principles used to determine its assessment.<sup>4</sup> The CDI Report acknowledges that the ATO approach seems to have an element of practicality and common sense about it, but warns that an over-enthusiastic administration can be a burden if no purpose is served by it being undertaken. (CDI p 109)

3.36 The 'orthodox' approach as described in the CDI Report appears to be reflected in the draft Bill, which uses the terms 'purpose' and 'activity' to refer to quite different concepts and on its face the draft Bill applies only to political purposes. On the other hand, the EM appears to reflect the approach adopted by the ATO as described in the CDI Report; 'purpose' and 'activity' are in some cases used interchangeably. This leads to the expectation that assessing whether a body has a political purpose of the kind covered by subsection 8(2) will involve an examination of its activities, and whether those activities are more than ancillary or incidental to the body's purposes. This discrepancy between the draft Bill and the EM seems to have been a major contributor to confusion in this area. The confusion between purpose and activity is further exacerbated by the failure to clearly define the meaning of 'ancillary or incidental'.

3.37 Advocacy for most charitable bodies embraces such activities as policy advice, community education and constituent representation. These activities may shade into political advocacy when the dominant purpose of a body is to procure a change in law, government policy or decisions of government authorities or to maintain the present law. Advocacy may also embrace overt political lobbying.

3.38 The Board notes that some submissions do not appear to distinguish between the kinds of advocacy described in subsection 8(2), which are generally speaking 'political'

---

4 Paragraphs 103-110 of Draft Taxation Ruling TR 1999/D21: Income tax and fringe benefits tax: charities; Income Tax Guide for Non-profit Organisations NAT7967-5.2003, p 35.



advocacy (although not all of them are ‘party-political’) and the non-political forms of advocacy, for instance community education or representation on behalf of individual, disabled or otherwise disadvantaged people.

3.39 The Board believes that the EM will create confusion for charitable bodies attempting to determine when the activity of advocacy, or attempting to change the law or government policy, ceases to be ‘ancillary or incidental’ and becomes a purpose that is more than ‘ancillary or incidental’. Among other things, the EM uses the expression ‘small scale’ as a test for whether an activity is incidental to a dominant purpose, but this test seems to have no basis in the draft Bill.

3.40 The Board believes that the lack of clarity in relation to advocacy activities partly arises from the existence of at least two different approaches to the common law in this area (see paragraphs 3.33-3.36). It is exacerbated by:

- the use in the EM of concepts such as ‘small scale’;
- confusion about the difference between political advocacy and other advocacy; and
- the possibility that some bodies may be currently endorsed as charities even though they are not, in fact, eligible for endorsement under either the orthodox or the ATO reading of the common law.

3.41 Under paragraphs 4(1)(a), (b) and (c) of the draft Bill, an entity may have a dominant purpose that is charitable and engage in advocacy activities that are consistent with this dominant purpose, but still fail the ‘ancillary or incidental’ test in subsection 8(2). From the submissions it has received and its own review, the Board considers that, because of the interrelationship between these provisions, the draft Bill may have certain consequences which need further consideration.

3.42 These consequences are as follows:

- A number of bodies (see paragraphs 3.19-3.23 above) have indicated that, if the draft Bill is enacted, they may no longer be recognised as charitable because their advocacy activities, which they consider are central to their charitable operations, would be more than ancillary or incidental as contemplated in subsection 8(2). On the Board’s reading of the draft Bill, there is some force to this suggestion.
- The difficulty in applying the words ‘ancillary or incidental’ in subsection 8(2) may cause a number of charities which currently engage in advocacy to curtail the extent of their advocacy activities because of the fear that those activities could be classed as a ‘disqualifying purpose’. This may impact on the effectiveness of those charities.
- There is a possibility that subsection 8(2) will encourage charities to adopt ancillary or incidental purposes as set out in that subsection, to include those purposes in their constituent documents, and to engage in those activities at an ancillary or incidental level. At present these bodies may not have such purposes or engage in such activities.

3.43 The Board considers that the above matters are significant and proposes that they be further considered by the Government with a view to providing greater clarity to the charitable sector. The following comments are provided to assist with any clarification of these matters:

- If the Government is simply following the common law treatment of advocacy, then there is a strong argument that it could achieve that outcome without the need for a subsection 8(2) in the draft Bill. The argument centres around the common law definition of charitable purposes which has generally excluded political or other non-charitable purposes.
- If the Government, in clarifying the common law, wishes to make it clear that overt political advocacy (which the Board does not take to mean advocating change to the law or government policy) is not a charitable purpose, then this could be better achieved by deleting subsection 8(2) and substituting a new subsection 10(3) as follows:

10(3) A reference in any Act to a charitable purpose does not include a reference to either of the following purposes:

- (a) the purpose of advocating a political party or [a political] cause;
  - (b) the purpose of supporting [or opposing] a candidate for political office.
- If the Government, in clarifying the common law, believes that the consequences outlined in paragraph 3.42 above necessarily follow (that is, are correct), then it should, in the EM or as it sees fit, explain that these are consequences to the sector.

## Recommendations

**3.44 The Board recommends that the Government provide greater clarity to the sector on how charitable bodies may be affected by the interrelationship between subsection 8(2) and paragraphs 4(1)(a), (b) and (c).**

**3.45 The Board makes the following recommendations in the event that the Government decides to retain subsection 8(2) in substantially its current form:**

- (a) **The Board recommends that the EM and if necessary the draft Bill be revised to clarify how the provisions of the draft Bill are intended to operate, and to deal with the following issues in particular:**

- The discrepancy between the words of the draft Bill, which maintain a clear distinction between activities and purposes, and the view expressed in the EM that charitable purpose may be determined by an examination of activities and other matters as well as purposes.
  - The tests that will be applied to determine whether particular activities have become purposes in their own right.<sup>5</sup>
- (b) The Board recommends that the draft Bill be amended to clarify whether ‘cause’ as used in paragraph 8(2)(a) is intended to mean ‘political cause’ or to have a more general application.
- (c) The Board recommends that consideration be given to whether paragraph 8(2)(b) should also refer to opposing a candidate for political office.
- (d) The Board recommends that the EM be revised to emphasise that subsection 8(2) applies only to:
- the purpose of advocating a political party or [a political] cause;
  - the purpose of supporting [or opposing] a candidate for political office;
  - the purpose of attempting to change the law or government policy;

rather than advocacy as this word is commonly understood in the community.

---

5 The Board notes that, under the draft Bill, the tests ‘ancillary or incidental’ apply only when these activities have become purposes – they are not a test for when an activity becomes a purpose. Refer to paragraph 3.39.

## Chapter 4: Charitable structure, core definition, not-for-profit entities, dominant purpose

---

Charities Bill 2003: Relevant sections:

### Section 3: **Definitions**

(1) In this Act, unless the contrary intention appears:

**entity** has the meaning given by section 960-100 of the *Income Tax Assessment Act 1997*.

### Section 4: **Core definition**

(1) A reference in any Act to a charity, to a charitable institution or to any other kind of charitable body, is a reference to an entity that:

- (a) is a not-for-profit entity; and
- (b) has a dominant purpose that:
  - (i) is charitable; and
  - (ii) unless subsection (2) applies—is for the public benefit; and
- (c) does not engage in activities that do not further, or are not in aid of, its dominant purpose; and
- (f) is not an individual, a partnership, a political party, a superannuation fund or a government body.

### Section 5: **Not-for-profit entities**

An entity is a **not-for-profit entity** if:

- (a) it does not, either while it is operating or upon winding up, carry on its activities for the purposes of profit or gain to particular persons, including its owners or members; and
- (b) it does not distribute its profits or assets to particular persons, including its owners or members, either while it is operating or upon winding up.

### Section 6: **Dominant purpose**

(1) An entity has a **dominant purpose** that is charitable if and only if:

- (a) it has one or more purposes that are charitable; and
- (b) any other purposes that it has are purposes that further or are in aid of, and are ancillary or incidental to, its purposes that are charitable.

(2) An entity has a **dominant purpose** that is for the public benefit if and only if:

- (a) it has one or more purposes that are for the public benefit; and
- (b) any other purposes that it has are purposes that further or are in aid of, and are ancillary or incidental to, its purposes that are for the public benefit.

## Introduction

4.1 The workability of the draft Bill will be tested, in part, by whether it enables charitable bodies to operate in a contemporary context. Charitable bodies are increasingly collaborating with each other, with business and with government to achieve their charitable purposes. They are adopting new corporate structures and financing models to achieve more effective and efficient services. One of the Board's Terms of Reference is to consider whether the draft definition is flexible enough to adapt to the changing needs of the sector, especially where the common law has not explicitly addressed certain issues.

4.2 The draft definition prescribes that a charitable body must be an entity, must be not-for-profit and must have a dominant charitable purpose (sections 3, 4, 5, 6). These sections, particularly when read with the EM, may lack the workability and flexibility the sector needs for the 21<sup>st</sup> century. In particular:

- The provisions might not cater for the structure of many modern charitable organisations either because the common law is unclear or because there are no relevant cases.
- The draft Bill and EM appear to diverge from the common law in some respects and could exclude some bodies that currently have charitable status.
- The definition could impede the development of more innovative and efficient structural arrangements within the sector such as new corporate structures, financing models and joint ventures.

4.3 The uncertainty about whether a charitable body's 'activities' will jeopardise its charitable status has been discussed in Chapter 3. The term 'ancillary or incidental' has caused uncertainty because it is not clearly defined, particularly since the EM suggests that 'scale' will be used to determine whether purpose or activities are 'ancillary or incidental'. This has particular relevance to charitable bodies which cross-subsidise their charitable activities through commercial activities and sizeable fund-raising.

## Overview of submissions

4.4 A number of submissions noted that the draft Bill and EM could exclude, or create uncertainty for, some entities that are now an integral part of the modern charitable sector.

### Groups of related entities

4.5 There may be no useful common law position on many modern structures within the charitable sector because there has been little development in the common law over recent decades. For example, some large complex organisations, especially religious organisations, now comprise a number of entities, each with a specific function that contributes towards an overall mission or charitable purpose. Some submissions noted that charitable bodies have also established separate legal entities to comply with legislative requirements in the finance and insurance sectors. These separate entities might not come within the definition of a charity even though they have been established to provide services exclusively to a charitable body or bodies. (Catholic Church; Anglicare)

4.6 The absence of common law guidance has left structural developments in the sector to be addressed by ATO rulings. ‘If the substance of the [ATO] policies are not incorporated into the Bill, the status of these entities may be compromised.’ (Catholic Church)

4.7 Some respondents stated that sections of the draft Bill do not accurately reflect the common law as it applies to the distribution of surpluses within a group of related charities. They also argued that the definition of not-for-profit (section 5) is unworkable as it goes further than the common law by prohibiting the distribution of profits and gain to ‘particular persons, including...owners or members’. ‘The common law only prohibits the distribution of profits and assets to “members”.... Any codification of the not-for-profit element should be no more onerous than the common law test.’ (Catholic Church in Australia)

4.8 Several suggestions were made to overcome these perceived problems for religious bodies. Some religious bodies have suggested: that the definition of entity could be amended to include a ‘religious institution’ so that all entities forming part of the institution could be regarded as charitable bodies (Catholic Church in Australia); or that the draft Bill could include special religious group provisions along the lines of the GST legislation.

### Bodies involved in commercial activities and fund-raising

4.9 A number of submissions queried whether some charitable bodies might lose their charitable status because of the scale of their involvement in commercial activities or fund-raising to support their charitable purpose. This uncertainty has particularly arisen because Example 1.1 in the EM, which deals with ascertaining when an activity will be considered ‘ancillary or incidental’, refers to fund-raising that is ‘small scale’. (Anglicare Australia; Salvation Army). There is a belief that this test of scale does not reflect the common law. It was suggested also that paragraph 4(1)(c) is unnecessary and overly restrictive in requiring that an entity not engage in any activities that do not further, or are not in aid of, its dominant purpose. It could also lead to interpretation difficulties. (Arnold Bloch Leibler; ACFOA; Oxfam Community Aid Abroad; ACROD Ltd)

### Partnerships, joint ventures and shared service arrangements

4.10 The draft Bill excludes a ‘partnership’ from the definition of a charitable body (paragraph 4(1)(f)).<sup>2</sup> Some respondents were concerned that this could exclude joint ventures formed to harness a diversity of skills and resources.

4.11 Some respondents noted that the draft Bill appears to exclude entities established to provide several charitable bodies with ‘shared services’, as it might be difficult to establish that the separate entity had a ‘dominant charitable’ purpose. This could impede efforts by charitable bodies to use their resources more efficiently following the example of the public and private sectors.

---

1 ACROD Limited suggested that an unintended consequence of section 5 could be the loss of charitable status for bodies whose beneficiaries were also members.

2 Section 3 defines ‘entity’ as having the meaning given by section 960-100 of the ITAA 1997. That section includes a ‘partnership’ within the definition of an entity. Partnership is further defined in section 995-1 of the ITAA 1997 as ‘an association of persons carrying on business as partners or in receipt of ordinary income or statutory income jointly, but does not include a company’.

## Charitable trust instruments

4.12 In Australia, testamentary charitable trust provisions are normally in favour of charitable purposes generally. Consequently, such trusts are taken to include purposes to benefit individuals who are 'poor relatives' or 'poor employees' of the founder (because of the common law's anomalous recognition of such purposes as charitable). However, the purpose of benefiting 'poor relatives' or 'poor employees' will be excluded from charitable status under the draft Bill (subsection 7(1)). This means that, for the purposes of subsection 6(1) of the draft Bill, standard testamentary charitable trusts will have purposes that are not charitable and that are not ancillary or incidental to charitable purposes.

4.13 It is rare for wills to have a power to amend. The only option available in such cases is to apply for a *cy prè*s order of the Supreme Court of the relevant State or Territory. This could be expensive and time consuming even if legally possible.

4.14 One suggestion was to include a provision that the legislation does not apply to charitable bodies established before the actual date of commencement of the legislation (foreshadowed to be 1 July 2004). This would be consistent with section 50-5 of the ITAA 1997 which grandfathers wills made before 1 July 1997 from certain provisions of Division 50. (Freehills)

4.15 Another suggestion is for the ATO to grant tax concessions on the condition the charitable body did not provide benefits to 'poor employees' or 'poor relatives'. If this option were possible it could avoid the need to change the instrument and the costs involved.

## Peak bodies

4.16 While a number of peak bodies in the charitable sector are currently Income Tax Exempt Charities (ITEC), some were uncertain if they would satisfy the requirements of having a dominant charitable purpose if the draft Bill is enacted. A number of submissions suggested that the draft Bill should state clearly that peak bodies representing charitable bodies are recognised as sharing the dominant charitable purpose of their members. (Church and Charitable Public Hospitals Association Ltd)

4.17 Suggestions for ensuring peak bodies do not lose their charitable status included:

- that the draft Bill adopts the approach to peak bodies reflected in Taxation Ruling TR 2003/5 in relation to PBIs; (ACROD Limited) or
- that peak bodies be specifically referred to in the definition of entity. (Federation of Community Legal Centres (Victoria) Incorporated)

### Bodies associated with government

4.18 The draft definition excludes a Commonwealth, State, Territory or foreign government body, and a body controlled by such a body, from being a charitable body under the draft Bill. The EM cites several PBI cases including the *Mines Rescue Board of New South Wales v. Commissioner of Taxation* to describe the common law approach to determining whether a body is subject to 'government control' (paragraphs 1.18-1.24). It notes that government control has been determined by whether, for example, a Minister has various powers over the composition and decisions of the Board. However, the common law has not been clear on this issue. '[T]he government control issue in practice is the most important and difficult issue we face in relation to the common law concept.' (Freehills)

4.19 Many submissions, especially from volunteer emergency services, legal services and health organisations which have close links with government, claimed that it is already difficult to determine whether they are charitable under the common law, and that paragraph 4(1)(f) does not aid this situation.

4.20 Volunteer emergency service organisations carrying out similar functions, each largely staffed by volunteers and supported by public fund-raising, could be treated differently for taxation concessions because some of them have founding statutes established under State Government Acts while others have been established by local government. (Fire and Emergency Services Authority of Western Australia (FESA)). FESA noted advice from the WA Crown Solicitor that confirmed its concerns. It was also suggested that, if charitable status were withdrawn from volunteer emergency service organisations, volunteers might choose not to be involved.

---

3 Taxation Ruling TR 2003/5: Income tax and fringe benefits tax: public benevolent institutions, paragraph 65:

'Coordination of services and support

65. However we accept that a non-profit organisation may be a public benevolent institution in the circumstances of the *Australian Council for Overseas Aid* case where:

- its members are predominantly public benevolent institutions;
- it has a common benevolent purpose with its members;
- it provides services only to its members (apart from any provided directly to persons in need of benevolent relief);
- for those members which are not public benevolent institutions, it serves them only in relation to their public benevolent activities;
- it does not carry on activities separately from its members;
- its activities can be properly considered as a step in the benevolent process of the group of organisations;
- it and its members can be appropriately regarded as one whole enterprise of which the organisation is an integral part; and
- its activities are such that if they had been performed by the members themselves they would have been regarded as being carried on in the course of performing their benevolent activities.'



4.21 Many submissions noted that the common law is now less clear following the recent case of *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue*.<sup>4</sup>

In this case, it was held that the body was not a charitable body even though the Minister had no control over the Board or budget.<sup>5</sup> This appears to be a significant development, as the cases cited in the EM indicate that funding alone will not be regarded as establishing government control.

4.22 There were several suggestions for a definition of 'government control', including:

- '... the power to direct completely the entity's acts and omissions, where such acts and omissions are not reasonably required under any funding agreement'; (Federation of Community Legal Centres (Victoria) Incorporated) and
- '... a definition of control based on that used in section 50AA of the Corporations Act.'<sup>6</sup> (Freehills)

4.23 The EM does not refer specifically to local government as being a 'government body'. It was unclear to respondents whether local governments have been excluded deliberately or whether they are to be included as bodies 'controlled by the Commonwealth, a State or a Territory.'

4.24 If local governments are to be included in the definition, respondents suggested that this should be stated clearly. If local governments are included as 'a body controlled by the Commonwealth, a State or a Territory', it should also be made clear whether a body within the control of a local government is to be regarded as a 'government body'. The City of

---

4 *Central Bayside Division of General Practice Ltd. v Commissioner of State Revenue* No. 8719 of 2002 (Victorian Supreme Court) on appeal from *Central Bayside Division of General Practice Ltd. v Commissioner of State Revenue* No. 2002/137 (Victorian Civil and Administrative Tribunal).

5 As held in *Metropolitan Fire Brigades Board v Federal Commissioner of Taxation* (1990) 27 FCR 279 and the *Mines Rescue Board of New South Wales v Commissioner of Taxation* (2000) 101 FCR 91.

6 Section 50AA of the *Corporations Act 2001*

'Control

- (1) For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.
- (2) In determining whether the first entity has this capacity:
  - (a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and
  - (b) any practice or pattern of behaviour affecting the second entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).
- (3) The first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity's financial and operating policies.
- (4) If the first entity:
  - (a) has the capacity to influence decisions about the second entity's financial and operating policies; and
  - (b) is under a legal obligation to exercise that capacity for the benefit of someone other than the first entity's members;the first entity is taken not to control the second entity.'

Salisbury indicated that a number of charitable bodies that it currently auspices might not be regarded as charitable bodies if the proposed provisions are enacted.

## Board assessment

4.25 The Board notes that the draft definition may not be sufficiently workable and flexible to charitable bodies as they operate today. In some cases this is because the draft Bill seeks to reflect the common law which remains either uncertain or no longer relevant to many emerging entities. Over the last 60 years, where no High Court cases have emerged, large charitable bodies have grown into complex groups of related entities. Other charitable bodies have begun collaborating in social enterprises where a business enterprise employs commercial practices to achieve its charitable objectives.

4.26 The Board is not convinced that the application of section 5 to distributions to 'owners' as well as to 'members' changes the common law in any significant way.

4.27 The question of whether peak bodies would meet the tests in the draft definition deserves some consideration. The ATO's Taxation Ruling TR 2003/5 recognises PBI peak bodies as PBIs, based on a 1982 case involving the Australian Council for Overseas Aid.<sup>7</sup> Peak bodies that exist to undertake functions such as education and research for charitable bodies would appear to be eligible if a similar approach were applied. The Board's view is that it would improve the workability of the draft definition if some clarity could be provided in the Bill as to whether or not peak bodies would generally qualify as charities. This could perhaps be achieved by providing an example of a peak body that satisfied the definition of a charitable body.

4.28 The exclusion of 'partnerships' from being charitable bodies under the draft Bill has created confusion. This confusion has arisen largely because the term 'partnership' is a loosely but commonly used term to describe a range of collaborations, strategic alliances and joint ventures in the sector. If the legal meaning of a 'partnership' as used in section 960-100 of the ITAA 1997 is strictly applied, this concept is only relevant to a for-profit entity. If this is the intended meaning of the reference in the draft Bill then the EM should clarify this meaning. A drafting note in the draft Bill may also be necessary. Such a note could be added after the definition of 'entity' in clause 3, and be along the following lines:

'Note: Under paragraph 4(1)(f) of this Act, some entities covered by the *Income Tax Assessment Act 1997* are not able to be recognised as charities, charitable institutions or any other kind of charitable bodies.'

4.29 The Board believes that clear statutory definitions of 'government body' and 'government control' are required. The EM uses several PBI cases to convey the common law position. However, the common law is still unclear, especially following the recent decision in *Central Bayside General Practice Division v. Commissioner of State Revenue*. This draft Bill provides the opportunity to provide clarity and certainty to the sector, especially to the many respondents who are unsure if they are 'government bodies' under the common law. The draft definition should also clarify whether local government and bodies controlled by local government are intended to be regarded as government bodies.

---

7 Taxation Ruling TR 2003/5 op cit.

4.30 The Board notes that testamentary trusts may not have a mechanism to amend their founding documents to meet the technical requirements of the draft definition. Grandfathering all charitable institutions established before enactment would be too wide an exemption that could defeat the purpose of the draft Bill. Another approach could be to permit such organisations to be prescribed as charitable by regulation.

4.31 The Board believes that the EM detracts from the clarity and workability of the draft Bill by indicating that an ‘activity’, such as fund-raising or revenue raising, which is not ‘small scale’ could put a body’s charitable status at risk.

4.32 The Board notes that it is unclear whether paragraph 4(1)(c) restricts the activities of a charitable body to activities that further or are in aid of its charitable purposes, or permits activities that further or are in aid of any of its acceptable purposes as described in section 6.

## Recommendations

4.33 The Board recommends that, to improve the workability of the Bill, some clarity be provided in the Bill as to whether or not peak bodies would generally qualify as charities.

4.34 The Board recommends that the draft Bill should be amended to provide a clear definition of ‘government body’, including whether local government (currently omitted) is included, and a clear definition of ‘controlled by government’.

4.35 The Board recommends that consideration be given to addressing the problems that may be caused for testamentary trusts by subsection 7(1).

4.36 The Board recommends that the meaning of ‘partnership’ in paragraph 4(1)(f) be clarified in the EM or by the insertion of a note in the draft Bill along the following lines:

*‘Note: Under paragraph 4(1)(f) of this Act, some entities covered by the *Income Tax Assessment Act 1997* are not able to be recognised as charities, charitable institutions or any other kind of charitable bodies.’*

4.37 The Board recommends that the words ‘small scale’ be removed from the EM’s example of ‘ancillary or incidental’ activities as it does not appear to be supported by the draft Bill, and further that the intent of paragraph 4 (1)(c) be clarified in the EM or the draft Bill.

4.38 The Board recommends that the relationship between paragraph 4(1)(c) and section 6 be clarified, possibly by the inclusion of a new subsection 6(3) along the following lines:

*‘(3) If an entity has a dominant purpose as described in subsection (1) or (2), then an activity engaged in by the entity furthers or is in aid of its dominant purpose if it furthers or is in aid of any of the purposes covered by that subsection.’*

## Chapter 5: Serious offence

---

Charities Bill 2003: Relevant sections:

### Section 4: **Core definition**

- (1) A reference in any Act to a charity, to a charitable institution or to any other kind of charitable body, is a reference to an entity that:
- (e) does not engage in, and has not engaged in, conduct (or an omission to engage in conduct) that constitutes a serious offence;

### Section 3: **Definitions**

**serious offence** means an offence against a law of the Commonwealth, of a State or of a Territory, that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

### Section 8: **Disqualifying purposes**

- (1) The purpose of engaging in activities that are unlawful is a **disqualifying purpose**.

## Introduction

5.1 Paragraph 4(1)(e) excludes from charitable status any entity that has engaged in or engages in conduct that constitutes a serious offence.

5.2 The issues raised in relation to this provision were whether it has a basis in common law and whether it is consistent with the treatment of other income tax exempt entities.

## Overview of submissions

5.3 A number of respondents regarded paragraph 4(1)(e) as unworkable, lacking in clarity and likely to increase administration costs. It could deny charitable status and result in an entity losing its PBI status.<sup>1</sup> (Freehills)

5.4 However, there was strong agreement that an unlawful purpose (as distinct from an isolated illegal activity) should be a disqualifying purpose as proposed by subsection 8(1).

---

1 For the purposes of Division 50 of the ITAA 1997, a public benevolent institution which is an entity is a charitable institution – paragraph 24 of Taxation Ruling TR 2003/5: Income tax and Fringe benefits tax: public benevolent institutions.

5.5 The concerns raised were as follows:

- Paragraph 4(1)(e) would not require a conviction. It would merely require that an entity has engaged in the conduct that constitutes a serious offence. It is also unclear what process, besides a judicial determination, would be used to establish that an entity has engaged in such conduct.
- The words 'has not engaged in' indicate that conduct that occurred before the draft Bill was enacted might be taken into account.
- It is unclear when loss of charitable status would occur: upon engaging in the conduct; upon administrative challenge; or when an administrative challenge is resolved.
- The definition of serious offence is confusing, especially for charitable organisations operating in a number of States or Territories, as each jurisdiction has a different definition of indictable offence.
- The draft Bill could result in double jeopardy as a charitable organisation effectively could be punished twice for the one offence.
- A charitable organisation could be at risk through vicarious liability for the acts of an agent, employee or volunteer, even though the organisation had exercised reasonable direction and control.
- A single instance of conduct (or omission to engage in conduct) that constitutes a serious offence could result in a charitable organisation losing charitable status forever as there is no process of rehabilitation.

5.6 Respondents also noted that the provision would impose an additional requirement on charitable organisations, compared with other income tax exempt entities, without a sound policy rationale.

5.7 Removal of charitable status is a blunt sanction which lacks the flexibility to respond appropriately to offences that vary in gravity. The sanction would also penalise the beneficiaries of a charitable body rather than any individuals who were responsible for the unlawful conduct.

5.8 Some respondents also noted that the sanction might be avoided inappropriately by:

- organisations establishing separate entities to quarantine their exposure to the risk of committing a 'serious offence'; and
- a disqualified organisation winding up and transferring its assets to a newly formed entity that could again apply for charitable status (a 'phoenix' charity).

## Board assessment

5.9 The Board agrees that an entity with the purpose of engaging in activities that are unlawful should not be permitted to be a charity. It notes that this is the position at common law and is provided for in subsection 8(1). However, paragraph 4(1)(e), which deals with engaging in conduct that constitutes a serious offence, does not reflect the common law.

5.10 The Board's view is that if the draft Bill is enacted in its current form in relation to paragraph 4(1)(e), some entities that are presently regarded as charitable for the purposes of Commonwealth legislation could lose their charitable status and never be able to regain it. This could have effects on beneficiaries, employees, volunteers and public confidence in charitable bodies in general.

5.11 The Board also agrees that paragraph 4(1)(e) provides no flexibility for regulators to respond to offences of varying gravity.

5.12 Some organisations that lose their status might consider establishing new entities that would fall within the new definition of a charity and attempting to transfer their present operations to the new body, which could seek charitable status without the baggage of past serious offences. Thus, even if paragraph 4(1)(e) were retained, the Board's view is that it would need amendment to ensure it was not avoided.

5.13 The Board is concerned that administration of this section could increase the costs of regulators, especially if enforcement extended to conduct that had not resulted in a conviction.

5.14 The Board's assessment is that paragraph 4(1)(e) is unnecessary in the draft Bill as the provision goes beyond the common law and would impose requirements on charitable bodies that are not imposed on other income tax exempt entities. Further, it might be more appropriate to penalise those responsible for a serious offence rather than the organisation.

## Recommendation

**5.15 The Board notes that subsection 8(1) would ensure that an entity with an unlawful purpose was not entitled to charitable status, and recommends that paragraph 4(1)(e) be removed, so that an instance of unlawful conduct would not disqualify an entity from obtaining or retaining charitable status.**



## Chapter 6: Public benefit and other definitional issues

---

### Introduction

6.1 This chapter addresses a range of other issues relating to the draft Bill. They include the following:

- The public benefit test and the common law (section 7).
- Broadening the list of charitable purposes (sections 10 and 11).
- The need to define 'religion' in the draft definition (section 12).

### Overview of submissions

#### Public benefit: section 7

6.2 **Presumption of public benefit:** A number of submissions were concerned that the draft Bill requires entities to meet the public benefit test in section 7. This is seen as a departure from the common law which holds that bodies with a charitable purpose under the three traditional heads of charity (the relief of poverty, the advancement of education, and the advancement of religion) are presumed to be established for the public benefit.

Subsection 7(1), however, omits the presumption by providing that:

- (1) A purpose that an entity has is for the *public benefit* if and only if:
  - (a) it is aimed at achieving a universal or common good; and
  - (b) it has practical utility; and
  - (c) it is directed to the benefit of the general community or to a sufficient section of the general community.

6.3 Several religious organisations were particularly concerned about this new requirement. 'Any loss of the common law presumption of public benefit will also raise a real possibility of an increased number of disputes between religious and other charitable organisations and government authorities as to whether the requisite public benefit exists for charitable status.' (Anglican Church Diocese of Sydney)

6.4 There is a perception that administrative costs could be considerably increased if it became necessary for religious bodies to demonstrate public benefit for each of their constituent entities, as required by the definition. The Anglican Church Diocese of Sydney suggested instead that the 'common law public benefit presumption be included as part of clause 7 of the proposed definition of charity in respect of all religious and other charitable



purposes except where the purpose is a “purpose that is beneficial to the community” (paragraph (10)(1)(g)).’

6.5 **‘Numerically negligible’:** A majority of respondents believed that subsection 7(2) might disqualify legitimate charitable bodies which have only a small number of beneficiaries.

Subsection 7(2) states that:

A purpose is not directed to the benefit of a sufficient section of the general community if the people to whose benefit it is directed are numerically negligible.

6.6 Some submissions argued that this test could exclude independent schools in geographically isolated communities, schools that cater for particular religions or the indigenous community, and schools with specialised education policies. The Deafness Forum of Australia provided the example of people who are both profoundly deaf and legally blind, where the number of people afflicted is small compared with the much larger group with hearing impairment. Other submissions noted that a trust established for a family whose house has burnt down, or a single person with a rare disease, have traditionally been considered to be charitable but appear to be excluded by the draft Bill.

6.7 Some respondents suggested that the terms ‘sufficient section’ and ‘numerically negligible’ were too vague and needed to be clarified, while others were concerned about the cost of compliance.

### Charitable purpose: section 10

6.8 In general, there was broad support for section 10 of the draft Bill. The clarification in section 11 that the ‘advancement of social or community welfare’ includes the care of, and the support and protection of, children and young people, and in particular, the provision of child care services was welcomed. Many respondents also considered that paragraph 10(1)(g) of the draft Bill (any other purpose that is beneficial to the community) provided adequate flexibility to meet the changing needs of the charitable sector in the future.

6.9 A number of submissions suggested further changes to section 10 and/or the EM, as follows.

#### Health

6.10 It was suggested that paragraph 10(1)(a) of the draft Bill could be clarified as outlined below:

- Advancement includes health promotion, health education, protection, early intervention, maintenance, treatment, support, research, health improvement and community development.

- Include services covering substance abuse and mental health. (The Australian Divisions of General Practice; Lifeline)
- Include the support of people with disabilities. (ACROD Ltd)

### Social or community welfare

6.11 The EM should make clear that the ‘advancement of social or community welfare’ in paragraph 10(1)(c) includes ‘the provision of housing and accommodation support for people with special needs or who are otherwise disadvantaged in terms of their access to housing’. (ACOSS, with support from Aged & Community Services Association of NSW & ACT; Aged and Community Services Australia; QCOSS; Australians for Native Title and Reconciliation; Multicultural Disability Advocacy Association of NSW; NCOSS; TASCOS; and the Community Housing Federation of Australia)

### Care of children

6.12 It was suggested that paragraph 10(1)(b) (the advancement of education) should be amended to include playgroup services as they fulfil an important role in early childhood and parent education. Playgroup Queensland noted that other organisations providing services to children and young people such as the Police Citizens Youth Club movement, Guides and Scouts have previously been listed by name to provide them with access to income tax exemption.

### Culture

6.13 The following suggestions were made to clarify the definition of culture (paragraph 10(1)(e)):

- Define culture to avoid issues of interpretation. (Artists Foundation of WA)
- Include all heritage listed sites and buildings, not just national ones. (Heritage Council of NSW; History Council of NSW)
- Add the advancement of arts, heritage and science. (CAF)

### Natural environment

6.14 The addition of this purpose at paragraph 10(1)(f) was widely welcomed. A number of respondents suggested adding ‘the built environment’ or simply referring to ‘the environment’ which would include the built environment. (Arnold Bloch Leibler)

### Other purposes beneficial to the community

6.15 ACOSS recommended that consideration should be given to amending paragraph 10(1)(g) to add the word ‘similar’ to the phrase ‘any other purpose that is beneficial to the community’ while retaining the proposed examples of such purposes in the EM. The intention would be to keep this ‘head’ of charity broadly consistent with its present common law meaning and that of the other ‘heads’.

6.16 A number of respondents recommended that the promotion of civil and human rights and reconciliation, and the protection and advancement of human rights should

appear in the draft Bill rather than in the EM (paragraph 1.84). (Australian Network of Environmental Defenders Offices; the Federation of Community Legal Centres (Vic) Inc; Central Highlands Community Legal Centre; Oxfam Community Aid Abroad; CAF; National Association of Community Legal Centres & Federation of Victorian Legal Centres; Australian Democrats; Blind Citizens Australia; Reichstein Foundation and Fitzroy Legal Service)

6.17 Other suggestions for additional charitable purposes included:

- 'Advancement of women and an equitable and just civil society.' (YWCA Sydney)
- 'Amateur sport'. (CAF)
- 'Promotion of patriotic activities'. (RSL)
- 'Aged care' to be inserted in the EM. (Cutler Hughes & Harris)

**Advancement: subsection 10(2)**

6.18 A number of submissions, including the Catholic Church, argued that 'advancement' at subsection 10(2) should be expanded to include 'advocacy' in addition to 'protection, maintenance, support, research and improvement'.

**Definition of Religion: section 12**

6.19 Some respondents objected to religion being defined in revenue legislation and urged that the common law should be retained in this respect. (B'Nai B'rith Australia; NSW Board of Jewish Deputies)

6.20 The National Aboriginal and Torres Strait Islander Ecumenical Commission noted: 'Religion as interpreted by clause 12 is a predominantly Western concept: one that fails to respond adequately to the diversity of traditions within contemporary Australian society.' 'The danger is that, in reflecting that heritage, other traditions which also merit being described as religious will be excluded, or may have to work much harder to justify their inclusion. NATSIEC is concerned both with traditional Christian theology and with Indigenous spirituality. While Christianity clearly falls within clause 12, some Indigenous people would not see their beliefs as constituting a religion in the sense defined by that section, and would therefore be at risk of falling outside its scope.'

6.21 Another option suggested was that the draft Bill could either incorporate the formulation of Mason ACJ and Brennan J in *The Church of New Faith v Commissioner of Pay-Roll Tax*<sup>1</sup>, which was accepted by the CDI Report as spelling out the principles of a religion. (Ann O'Connell)

---

1 *The Church of New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120.

## Board assessment

6.22 The Board believes that section 7 would be more workable if it provided that the size of the group intended to receive a charitable benefit be assessed against the size of that part of the community to whom the purpose would be relevant, rather than the community at large.

6.23 There were many suggestions for clarifying or expanding the definition of charitable purpose in the draft Bill. The Board's view is that expanding the definition is outside its Terms of Reference and it notes the many suggestions for clarification. The Board's view is that the definition is adequate and that further clarifications should be addressed in the EM.

6.24 The Board notes that a number of respondents had concerns about the definition of religion in the draft Bill. However, the Board's view is that the draft Bill does not purport to define religion; in fact it simply lists matters to be considered in identifying a religion (subsection 12(1)) and specifies that other matters may also be considered (subsection 12(2)).

## Recommendation

**6.25 The Board recommends that section 7 be amended to provide that 'sufficient section' is defined as one which is not 'numerically negligible' compared with the size of that part of the community to whom the purpose would be relevant.**



## Chapter 7: Altruism

---

### Terms of Reference

In addition, the Board should specifically consult on whether the public benefit test in the Charities Bill 2003 should require the dominant purpose of a charitable entity to be altruistic, as recommended by the Report of the Inquiry into the Definition of Charities and Related Organisations.

### Introduction

7.1 The CDI recommended '[t]hat the public benefit test be strengthened by requiring that the dominant purpose of a charitable entity must be altruistic' (recommendation 7, p 125). The Board notes that this is not a requirement in the common law.

7.2 The CDI also stated that '[a]n organisation may provide a benefit to the public without necessarily acting altruistically. ....In its simple dictionary meaning, altruism may be defined as "unselfish concern for the welfare of others" or "regard for others as a principle for action". The key elements of these definitions are unselfishness and concern for others. In the context of charity, altruism can also be characterised as a voluntarily assumed obligation towards the wellbeing of others or the community generally.' (CDI p 124)

### Overview of submissions

7.3 In the group discussions conducted by the Board, those attending almost universally indicated that they regarded the requirement of 'altruism' as unnecessary or as another test that would reduce clarity and increase administrative costs. Submissions differed widely in their response to this question with more than half providing either no comment or a neutral position. A minority were opposed largely because it could require additional administrative work. They argued that the term was vague, subjective or redundant. A very small number of submissions were in favour of the term being added.

### The case for changing the public benefit test to include altruism

7.4 Some of the submissions which supported a change to the public benefit test regarded altruism as an important distinguishing feature of a 'charity' as understood by the general community.

7.5 ACOSS, supported by a small number of other submissions, favoured the change in the public benefit test as it might exclude charitable status for organisations that provide health, education or welfare services to an 'exclusive' group, such as people on high incomes. 'This would, in our view, be consistent with the underlying purpose and meaning of charitable status.'

7.6 Several submissions indicated that the current activities of some organisations might be subject to greater scrutiny if the term 'altruistic' were adopted and that this was to be encouraged. 'Altruism should be encouraged and material gain be discouraged i.e. large business owned by a charity should be subject to the same taxes as ordinary business.' (Humanist Society of South Australia)

7.7 A small number of submissions anticipated that the change would strengthen the public benefit test to the detriment of some organisations. 'For some time, the sector has had to tolerate private operators who, by the nature of their organisation exclude people. Many instances of exclusion have been historically based on sexual preference or religion but also on monetary grounds. This unfortunate blight on the good work of Australian charities has been particularly apparent within the private school sector.' (Federation of Parents and Citizens Associations of NSW)

### The case against changing the public benefit test to include altruism

7.8 Submissions that opposed the change did so for a number of reasons, as set out below.

7.9 Altruism is inconsistent with the draft Bill's inclusion of self-help groups. '[T]here is an inconsistency between a strict concept of altruism and the important principle....of an open and non-discriminatory self-help group.' (W.A. Lee)

7.10 A number of submissions argued that the draft Bill's definition is adequate. The Catholic Church in Australia's submission was similar to many from major organisations in suggesting that the draft Bill does not need to change in this respect: 'The proposed elements of the core definition operate cumulatively to ensure that entities that are not for the public benefit do not qualify as charities. The motivation for the charitable purpose or activity is not always easy to discern. The inclusion of altruism would produce no additional benefit.'

7.11 The potential difficulty in assessing whether a dominant charitable purpose was 'altruistic' was raised in many submissions. Adopting the term '...may require those applying the charity definition legislation to assess the motivations of the people directing or managing a charitable organisation. These assessments are likely to be subjectively and inconsistently applied.' (ACROD Ltd)

7.12 A number of submissions, including that from the Independent Schools of Australia, noted that the term 'altruistic' was ambiguous and suffered from not having a judicial meaning.

7.13 Several submissions noted that the CDI Report had proposed a major change to the definitional framework. As this had not been followed, adopting the further recommendation regarding the term 'altruistic' was not advisable. 'The recommendation that such a test be applied by the CDI was tied up with a number of other recommendations that required a definitional framework to distinguish "altruistic" entities from other entities and included the creation of new types of entities. Unless the government is willing to go down this path, which includes significant changes to the existing situation, the inclusion of the term "altruistic" only engenders greater uncertainty.' (Australian Flying Corps and Royal Australian Air Force Association)

## Board assessment

7.14 The Board believes that the draft Bill's core definition is sufficiently robust as it is currently drafted. It requires the dominant purpose of an entity to be charitable and for the public benefit, and the entity also to be not-for-profit. Further qualification may be of symbolic value only, adding to the administrative burden.

7.15 The Board also notes that the CDI Report proposed a marked change to the definitional structure of the charitable sector and that this has not been adopted. The case for including the concept of altruism appears to have been integral to CDI recommendations but not relevant to the approach adopted in the draft Bill.

## Recommendation

7.16 **The Board recommends that it is not necessary to require an entity's dominant charitable purpose to be altruistic as the public benefit test is adequate.**





## Chapter 8: Administrative burden

---

### Introduction

8.1 In its guide to preparing a submission, the Board asked whether the draft Bill would impose any additional administrative burden on charitable organisations. The Board received a wide range of views on this issue. While the issue was discussed in the group meetings, only a minority of submissions raised the issue.

### Overview of submissions

8.2 Some respondents stated that it would be difficult to assess the administrative burden until the draft Bill had become law and they had practical experience with its administration. In addition, respondents noted that they did not know what consequential legislative amendments would follow enactment of the Bill and therefore could make no assessment of the administrative burden. (Multicultural Disability Advocacy Association of NSW; the Anglican Church Diocese of Sydney; Aged and Community Services Australia; Anglicare Australia)

8.3 Other respondents believed that there would be no change, or very little change, in the administrative burden on charitable bodies. (Berry Street Victoria; the Victorian Healthcare Association; the Cancer Council South Australia; the Smith Family; Chinese Australian Services Society Co-operative Ltd; Uniting Healthcare)

### Issues relating to administrative burden

8.4 Those respondents who raised concerns about the administrative burden argued that the draft Bill would inevitably increase their administration and compliance costs for the reasons listed below. (Asylum Seekers Centre Inc; VCOSS; Alcohol and Other Drugs Council of Australia; Australian Council for Overseas Aid; Fundraising Institute of Australia; National Aboriginal and Torres Strait Islander Ecumenical Commission; Australian Federation of Homelessness Organisations)

### The new Bill needs to be interpreted over time

8.5 If the Bill is enacted, charitable bodies may need to spend more time monitoring the interpretation of the legislation and any new tax rulings and additional tax information.

### The serious offence provision could increase costs

8.6 The serious offence provision could increase legal and administrative costs if it results in an increase in ATO inquiries. As discussed in chapter 5, the scope of this section could create an additional administrative burden. (VCOSS; ACFOA)

## Identifying advocacy activities would cost time and money

8.7 Many respondents assumed that they would need to spend more time recording advocacy activities as a result of the disqualifying purpose provision in paragraph 8(2)(c). Few respondents attempted to cost additional record-keeping.

## Board assessment

8.8 The Board notes that some respondents were concerned that administrative costs would increase with the enactment of the draft Bill. However, the Board was unable to identify any measurable circumstance under which the proposed legislation could be expected to directly increase the administrative burden on charities. In particular, the Board notes that the ATO<sup>1</sup> has provided advice that it will not require any additional record-keeping if the draft Bill is enacted.

8.9 Some of the sector's concerns would be addressed if the serious offence provision is removed from the draft Bill as the Board has recommended.

8.10 The Board believes that there would be less confusion and less unnecessary record-keeping if the term 'small scale', which is used to describe an 'ancillary or incidental' activity, is removed from the EM. (See chapters 3 and 4 and recommendation 4.37.)

8.11 There is also some uncertainty among respondents about what activities would be regarded as 'attempting to change the law or government policy' and how they should be accounted for. As previously discussed, the Board believes that further information should be provided to the sector to eliminate uncertainty.

## Recommendations

8.12 The Board recommends that:

- **the practical application of the draft Bill should be the subject of a post-implementation review within two to three years of its implementation; and**
- **for the purposes of the post-implementation review, a base-line study of the current administrative burden should be started before the draft Bill is implemented.**

8.13 The Board recommends that an education program and compliance tool-kit be provided by government to the charitable sector to accompany the enactment of the draft Bill.

---

1 ATO Minute No: 480/2003, paragraph 12, p 3. Refer Appendix 7.

## Chapter 9: Other views on charitable sector reform

---

### Introduction

9.1 A number of submissions raised concerns which were significant to the charitable sector but which are beyond the Board's Terms of Reference. This chapter provides a summary of these concerns. The Board makes no assessments or recommendations, but identifies the views for the Treasurer's information.

### The draft Bill should be a first step in a program of legislation to rationalise the regulation of the sector

9.2 A number of submissions supported the draft Bill as a step towards a simpler regulatory system. Some charitable bodies have to deal with the Commonwealth, six State and two Territory jurisdictions. Respondents stated that this is wasteful and confusing. They argued that administrative costs could be reduced with greater coordination between the Commonwealth and the States.

9.3 A number of respondents also preferred a simpler definitional framework along the lines recommended by the CDI Report. They argued that it was confusing for the sector and for the public to continue with a system that has separate rules for ITECs, PBIs and DGR status.

9.4 There was also support for the introduction of an independent administrative body to regulate charitable bodies along the lines of The Charity Commission for England and Wales. Respondents felt that this would help to increase accountability and transparency in the sector. It would also remove the ATO's current role of assessing charitable status, a move which had support among some respondents. Respondents were in favour of the following CDI recommendations:

24. That the Government seek the agreement of all State and Territory Governments to the adoption nationally of the definitional framework for charities and related entities recommended in this Report. (CDI p 291)
25. That the Government seek the agreement of all State and Territory Governments to establish an independent administrative body for charities and related entities, and to the legislative changes necessary for its establishment. (CDI p 294)

(Refugee Council of Australia; ACFOA; Cancer Council Australia; National Anglican Resources Unit; QCOSS; NAPCAN; NCOSS; Victorian Women's Refuges & Assoc. Domestic Violence Services)

## Interpretation issues

9.5 A number of submissions raised issues about the general legal interpretation of the draft Bill. These included whether the draft Bill is intended to be an orthodox code; if so then the previous common law might not inform the interpretation of the plain words of the statute.

9.6 They also suggested that the draft Bill might achieve greater simplicity and clarity and avoid unintended misinterpretation if it adopted the legislative approach followed in several other jurisdictions that have modified the definition of a charity.

## Codification

9.7 The EM states that the legislative definition in the draft Bill 'is intended to provide clarity to entities within the charitable sector, by codifying the definition' (paragraph 1.5). An orthodox codifying Act gathers together all the relevant statute and case law on a given topic and restates it as a complete and exclusive statement of the law on that topic. A common issue relating to the judicial interpretation of codifying statutes is whether or not it is possible to have regard to either the case law or the statutes that have been superseded by the code. The High Court has said: 'It is well settled that the Code must be interpreted according to its terms without resort to any presumption that its provisions reflect the common law either at the time of the Code's enactment or subsequently.'<sup>1</sup>

9.8 Freehills argued that 'rather than provide clarity, the code approach will raise significant and difficult issues of interpretation.' Instead they suggested the following:

- removing the references to 'a code' from the EM; and
- inserting a provision similar to section 4 of the *Partnership Act 1958 (Vic)* along the lines of: 'The rules of equity and of common law applicable to charities will continue in force except so far as they are inconsistent with the express provisions of this Act' to ensure that the provisions are not interpreted without the benefit of the common law heritage.

## Alternative to codification

9.9 A number of respondents suggested that the Government should consider retaining the common law approach and legislate only for those changes to the common law position that the Government expressly intends to make. (Freehills; Catholic Church in Australia; Philanthropy Australia). This would follow the approach of English law and each Australian State and Territory in widening the definition of charity to include recreational charities.<sup>2</sup>

9.10 Submissions noted that this approach would retain the flexibility of the common law to evolve and avoid having to restate the common law which can result in unintended

---

1 *R v Barlow* (1997) 188 CLR 1 at page 18.

2 See, for example: subsection 103(2) of the *Trusts Act 1973 (Qld)*; subsection 69C(1) of the *Trustee Act 1936 (SA)*; subsection 5(1) of the *Charitable Trusts Act 1962 (WA)*; and subsection 4(1) of the *Variation of Trusts Act 1994 (Tas)*.

consequences. This would result in a simpler provision with greater certainty and a clearer focus on the specific changes to the common law.

## Constitutional validity

9.11 Several respondents submitted the view that the Commonwealth Parliament does not have the explicit power under the Australian Constitution to regulate charities or their activities. The purpose of the draft Bill is to define charities and not to regulate their activities. Respondents pointed out that if the draft Bill went beyond this, there may be grounds for arguing that Parliament has overstepped its constitutional powers. (Central Highlands Community Legal Centre; Federation of Community Legal Centres (Vic) Inc)

9.12 Professor Michael Chesterman, QC submitted that: ‘It can indeed be argued that the existing “disqualification” on political activity by charities infringes a principle of constitutional law known as the “implied freedom of political communication”, or at least is counter to the spirit of this principle. The disqualification has the effect of stifling political debate, to the extent that organisations whose purposes are in other respects clearly charitable are deterred from engaging in the relevant forms of political communication – advocating changes in the law, the administration of the law, or government policy – in pursuit of those purposes. They are wary of doing so because they may be deemed non-charitable and may thereby lose valuable tax benefits.’

9.13 Other submissions argued that the draft Bill could be seen as imposing restrictions on religious freedom. One submission referred to section 116 of the Constitution which states that ‘The Commonwealth shall not make any law ... for prohibiting the free exercise of any religion ....’ (K. J. Patterson OAM)



# Appendix 1

## Charities Bill 2003





2002-2003

The Parliament of the  
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

*Presented and read a first time*

<b>EXPOSURE DRAFT</b>
-----------------------

## **Charities Bill 2003**

**No.     , 2003**

*(Treasury)*

**A Bill for an Act to define charities and charitable  
purpose, and for related purposes**

**EXPOSURE DRAFT**



---

## Contents

<b>Part 1—Preliminary</b>	1
^1 Short title .....	1
^2 Commencement .....	1
^3 Definitions .....	2
<b>Part 2—Charities</b>	3
^4 Core definition .....	3
^5 Not-for-profit entities .....	3
^6 Dominant purpose .....	4
^7 Public benefit .....	4
^8 Disqualifying purposes .....	5
^9 Open and non-discriminatory self-help groups .....	5
<b>Part 3—Charitable purpose</b>	6
^10 References to charitable purpose .....	6
^11 Advancement of social or community welfare .....	6
^12 Religion .....	6



1     **A Bill for an Act to define charities and charitable**  
2     **purpose, and for related purposes**

3     The Parliament of Australia enacts:

4     **Part 1—Preliminary**  
5

6     <sup>^</sup>1 **Short title**

7             This Act may be cited as the *Charities Act 2003*.

8     <sup>^</sup>2 **Commencement**

9             This Act commences on 1 July 2004.

---

*Charities Bill 2003*    No.   , 2003    1

**EXPOSURE DRAFT**

Section ^3

---

1     **^3 Definitions**

2             (1) In this Act, unless the contrary intention appears:

3                     *advancement* includes the meaning given by subsection ^10(2).

4                     *advancement of social or community welfare* includes the  
5                     meaning given by section ^11.

6                     *disqualifying purpose* has the meaning given by section ^8.

7                     *dominant purpose* has the meaning given by section ^6.

8                     *entity* has the meaning given by section 960-100 of the *Income Tax*  
9                     *Assessment Act 1997*.

10                    *government body* means:

11                       (a) the Commonwealth, a State or a Territory; or

12                       (b) a body controlled by the Commonwealth, a State or a  
13                       Territory; or

14                       (c) the government of a foreign country; or

15                       (d) a body controlled by the government of a foreign country.

16                     *not-for-profit entity* has the meaning given by section ^5.

17                     *open and non-discriminatory self-help group* has the meaning  
18                     given by section ^9.

19                     *public benefit* has the meaning given by section ^7.

20                     *serious offence* means an offence against a law of the  
21                     Commonwealth, of a State or of a Territory, that may be dealt with  
22                     as an indictable offence (even if it may, in some circumstances, be  
23                     dealt with as a summary offence).

24             (2) To avoid doubt, the definitions of terms in this section do not apply  
25             in any Act other than this Act.

1

2

**Part 2—Charities**

3

4

**^4 Core definition**

5

(1) A reference in any Act to a charity, to a charitable institution or to any other kind of charitable body, is a reference to an entity that:

6

7

(a) is a not-for-profit entity; and

8

(b) has a dominant purpose that:

9

(i) is charitable; and

10

(ii) unless subsection (2) applies—is for the public benefit; and

11

12

(c) does not engage in activities that do not further, or are not in aid of, its dominant purpose; and

13

14

(d) does not have a disqualifying purpose; and

15

(e) does not engage in, and has not engaged in, conduct (or an omission to engage in conduct) that constitutes a serious offence; and

16

17

(f) is not an individual, a partnership, a political party, a superannuation fund or a government body.

18

19

20

(2) The entity's dominant purpose need not be for the public benefit if the entity is:

21

22

(a) an open and non-discriminatory self-help group; or

23

(b) a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public.

24

25

26

**^5 Not-for-profit entities**

27

An entity is a *not-for-profit entity* if:

28

(a) it does not, either while it is operating or upon winding up, carry on its activities for the purposes of profit or gain to particular persons, including its owners or members; and

29

30



Section ^6

---

- 1 (b) it does not distribute its profits or assets to particular persons,  
2 including its owners or members, either while it is operating  
3 or upon winding up.

4 **^6 Dominant purpose**

- 5 (1) An entity has a *dominant purpose* that is charitable if and only if:  
6 (a) it has one or more purposes that are charitable; and  
7 (b) any other purposes that it has are purposes that further or are  
8 in aid of, and are ancillary or incidental to, its purposes that  
9 are charitable.
- 10 (2) An entity has a *dominant purpose* that is for the public benefit if  
11 and only if:  
12 (a) it has one or more purposes that are for the public benefit;  
13 and  
14 (b) any other purposes that it has are purposes that further or are  
15 in aid of, and are ancillary or incidental to, its purposes that  
16 are for the public benefit.

17 **^7 Public benefit**

- 18 (1) A purpose that an entity has is for the *public benefit* if and only if:  
19 (a) it is aimed at achieving a universal or common good; and  
20 (b) it has practical utility; and  
21 (c) it is directed to the benefit of the general community or to a  
22 sufficient section of the general community.
- 23 (2) A purpose is not directed to the benefit of a sufficient section of the  
24 general community if the people to whose benefit it is directed are  
25 numerically negligible.
- 26 (3) Subsection (2) does not limit the other circumstances in which a  
27 purpose is not for the benefit of the general community or to a  
28 sufficient section of the general community.

1     **^8 Disqualifying purposes**

2             (1) The purpose of engaging in activities that are unlawful is a  
3                 ***disqualifying purpose***.

4             (2) Any of these purposes is a ***disqualifying purpose***:

5                 (a) the purpose of advocating a political party or cause;

6                 (b) the purpose of supporting a candidate for political office;

7                 (c) the purpose of attempting to change the law or government  
8                     policy;

9             if it is, either on its own or when taken together with one or both of  
10            the other of these purposes, more than ancillary or incidental to the  
11            other purposes of the entity concerned.

12     **^9 Open and non-discriminatory self-help groups**

13             An entity is an ***open and non-discriminatory self-help group*** if:

14                 (a) it is an association of individuals that has an open and  
15                     non-discriminatory membership; and

16                 (b) it is established for the purpose of assisting individuals  
17                     affected by a particular disadvantage or discrimination, or by  
18                     a need that is not being met; and

19                 (c) it is made up of, and controlled by, individuals who are  
20                     affected by the disadvantage, discrimination or need; and

21                 (d) all of its criteria for membership relate to its purpose; and

22                 (e) its membership is open to any individual who satisfies the  
23                     criteria.

1

2

3

## Part 3—Charitable purpose

4

### ^10 References to charitable purpose

5

(1) A reference in any Act to a charitable purpose is a reference to any of the following purposes:

6

7

(a) the advancement of health;

8

(b) the advancement of education;

9

(c) the advancement of social or community welfare;

10

(d) the advancement of religion;

11

(e) the advancement of culture;

12

(f) the advancement of the natural environment;

13

(g) any other purpose that is beneficial to the community.

14

(2) *Advancement* includes protection, maintenance, support, research and improvement.

15

16

### ^11 Advancement of social or community welfare

17

Without limiting what constitutes the advancement of social or community welfare, *advancement of social or community welfare* includes:

18

19

20

(a) the care of, and the support and protection of, children and young people; and

21

22

(b) in particular, the provision of child care services.

23

### ^12 Religion

24

(1) In determining, for the purposes of paragraph ^10(1)(d), whether particular ideas, practices and observances constitute a religion, regard is to be had to:

25

26

27

(a) whether the ideas and practices involve belief in the supernatural; and

28

29

(b) whether the ideas relate to people's nature and place in the universe and their relation to things supernatural; and

30

- 1 (c) whether the ideas are accepted by adherents as requiring or  
2 encouraging them to observe particular standards or codes of  
3 conduct or to participate in specific practices having  
4 supernatural significance; and  
5 (d) whether, however loosely knit and varying in beliefs and  
6 practices adherents may be, they constitute one or more  
7 identifiable groups; and  
8 (e) whether adherents see the collection of ideas and/or practices  
9 as constituting a religion.
- 10 (2) This section does not limit the matters to which regard may be had  
11 in determining whether particular ideas, practices and observances  
12 constitute a religion.



# Appendix 2

## Charities Bill 2003

### Explanatory Material



# EXPOSURE DRAFT

---

## CHARITIES BILL 2003

---

### EXPLANATORY MATERIAL

(Circulated by authority of the  
Treasurer, the Hon Peter Costello, MP)









---

## **General outline and financial impact**

---

### **Definition of a charity**

The Charities Bill 2003 introduces a legislative definition of both a charity and a charitable purpose. The legislative definition replaces the current interpretation of the term charity, which has been based on over 400 years of common law. The legislative definition is intended to provide clarity to entities within the charitable sector.

***Date of effect:*** The new definition will apply from 1 July 2004.

***Proposal announced:*** The intention to introduce a definition was announced in Treasurer's Press Release No 49 of 29 August 2002, as part of the Government's response to the *Report of the Inquiry into the Definition of Charities and Related Organisations*.

***Financial impact:*** The estimated cost to revenue of the legislative definition of a charity is \$3 million per year from 2005-2006.

***Compliance cost impact:*** Compliance costs should be reduced as the new definition of a charity should clarify issues for the charitable sector and remove uncertainties and inconsistencies.



---

# **Chapter 1**

## **Definition of a charity**

---

### **Outline of chapter**

1.1 The Charities Bill 2003 introduces a legislative definition of both a charity and a charitable purpose. The intention to introduce a legislative definition was announced in Treasurer's Press Release No 49 of 29 August 2002, as part of the Government's response to the *Report of the Inquiry into the Definition of Charities and Related Organisations*.

1.2 The definition will apply to all Commonwealth legislation, replacing the previous common law interpretation. In particular, the definition will apply to taxation law, providing a clear framework within which to assess the eligibility of entities for certain tax concessions.

### **Context of amendments**

1.3 The definition of a charity has been developed as part of the Government's response to the *Report of the Inquiry into the Definition of Charities and Related Organisations*.

1.4 The definition essentially codifies the existing common law interpretation of the meaning of a charity. The common law interpretation has been based on over 400 years of common law, largely based upon the *Preamble to the Statute of Charitable Uses*, enacted by the English Parliament in 1601 (the Statute has since been repealed).

1.5 The legislative definition is intended to provide clarity to entities within the charitable sector, by codifying the definition.

### **Summary of new law**

1.6 The legislative definition of a charity is largely similar to the previous common law interpretation. The definition is, however, somewhat broader, explicitly including:

- not-for-profit child care available to the public;

- self-help bodies with open and non-discriminatory membership; and
- closed or contemplative religious orders that offer prayerful intervention for the public,

subject to the additional requirements of the definition.

1.7 These additional inclusions resolve ambiguities and inconsistencies within the current common law definition.

1.8 With the exception of the above extensions, the definition is based upon the previous common law definition. The definition requires that an entity must be not-for-profit, have a dominant purpose or purposes that are charitable and for the public benefit.

1.9 In addition, this bill includes a definition of a charitable purpose, also to apply to all Commonwealth legislation.

## **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
This bill contains a legislative definition for both a charity and a charitable purpose. This definition will apply to all Commonwealth legislation and is broadly consistent with the previous common law interpretation.	No legislative definition for a charity currently exists. Instead, the common law interpretation of a charity is used.

## **Detailed explanation of new law**

1.10 The Charities Bill 2003 contains definitions of both a charity, and a charitable purpose.

### **Definition of a charity, charitable institution or other charitable body**

#### *What is a charity?*

1.11 Part 2 of this bill consists of the core definition, followed by more detailed explanations of the requirements to satisfy the definition of a charity. *[Part 2, section 4]*

1.12 The core definition identifies a charity, a charitable institution or any other kind of charitable body, and requires that the entity be not-for-profit, with a dominant charitable purpose that is, with some exceptions, for the public benefit. The entity must not have a disqualifying purpose.

1.13 The term 'entity' has the meaning given by section 960-100 of the *Income Tax Assessment Act 1997*. [*Part 1, subsection 3(1)*]

1.14 The concepts of not-for-profit, dominant purpose, charitable purpose, public benefit and disqualifying purpose are discussed in further detail in paragraphs 1.25 to 1.84.

1.15 In addition, any activities in which the charity engages must further, or be in aid of, its charitable purpose. This requirement ensures that the entity must give effect to its charitable purpose. The activities of the entity, when considered with the dominant purpose of the entity, form an overall picture as to the charitable character of the entity. Activities are not considered in order to determine the best way for the entity to achieve its purpose; but simply that the entity gives effect to that purpose by furthering it.

1.16 The activities of the charity must also be legal. An entity will not be a charity if it engages in, or has engaged in, conduct (or omitting to engage in conduct) constituting a serious offence. For these purposes, a serious offence is an offence against the law of the Commonwealth, of a State or of a Territory that may be dealt with as an indictable offence, even if it may also be dealt with as a summary offence. [*Part 1, subsection 3(1)*]

***What type of entity can be a charity?***

1.17 There is some restriction on the type of entity that will be considered a charity. Individuals, partnerships, political parties, superannuation funds and government bodies will not meet the definition. Entities that will meet the definition include, without restriction, a body corporate, a corporation sole, an association or body of persons whether incorporated or not and a trust.



**What is a Government body?**

1.18 The term ‘Government body’ has been defined to include a body controlled by the Commonwealth, a State or a Territory, as well as a body controlled by the government of a foreign country [*Part 1, subsection 3(1)*]. The issue of what establishes government control has been the subject of much case law.

1.19 Government funding and/or government regulation will not generally, of itself, be considered sufficient to establish that an entity is controlled by the government. In the normal course of events, many charitable entities are funded as a means of government support for the work of that entity. Charitable entities are also regulated, usually to ensure that the services they provide meet a minimum standard. In the absence of other relevant factors, neither of these circumstances will necessarily indicate that the body is controlled by government.

1.20 In certain circumstances, however, both government funding and government regulation may be considered to be factors that are relevant in determining the existence of government control. For example, if the entity is funded through a government-imposed levy or tax of some kind, or if the entity is regulated to the extent that it is merely carrying on its activities at the government’s instruction or on the government’s behalf it may be considered to be a government body.

1.21 More usually, government control involves the ability of the government (often a Minister) to exercise control over the operations and activities of the entity.

1.22 The following indications of government control of an entity can be extrapolated from recent cases, including *Metropolitan Fire Brigades Board v FC of T 91 ATC 4052* and *Mines Rescue Board of New South Wales v Commissioner of Taxation 2000 FCA 1162*:

- powers invested in a Minister to approve appointments to a management board;
- powers invested in a Minister to remove appointments from the management board (or to dissolve the board);
- powers invested in a Minister to overturn decisions of the management board, or to instruct the management board;
- powers invested in a Minister to approve the work program of the entity; and

- the ability of a management board to exercise the powers of government, such as the power to make by-laws and to impose penalties for breaches of those by-laws.

1.23 While the idea of ‘Government function’ has previously been held to be a relevant factor in determining that a body was a government body, this is no longer necessarily the case. Should the function of an entity be considered to be a government function, this may assist in reaching a conclusion that the entity is a government entity.

1.24 In *Metropolitan Fire Brigades Board v FC of T* 91 ATC 4052, it was held that the provision of metropolitan fire brigades was a government function. In *Mines Rescue Board of New South Wales v Commissioner of Taxation* 2000 FCA 1162, however, while the mines rescue function was not found to be a government function, it was held that this did not differentiate the two cases.

#### ***What is a not-for-profit entity?***

1.25 An entity is a not-for-profit entity if it is not carried on for the purpose of profit or gain to its individual members and does not distribute its profits or assets to its owners or members, or to any other person, either while it is operating or upon winding up. *[Part 2, section 5]*

1.26 The term not-for-profit does not imply that a charitable entity will not generate a profit. Activities, such as commercial activities, may be undertaken with the purpose of generating a profit, without this effecting the charitable status of the entity, provided that the profits are directed towards the charitable purpose of the entity. In this circumstance, however, any purposes that are not charitable and for the public benefit would need to further or be in aid of, and be ancillary or incidental to the dominant purpose, as discussed in paragraph 1.30.

1.27 The reasonable payment of wages or allowances to employees, the reimbursement of expenses, payment for services and similar payments would not normally be considered the distribution of profits or assets.

#### ***How is the dominant purpose determined?***

1.28 For the dominant purpose of an entity to be charitable, the entity must have a purpose or purposes that are charitable. *[Part 2, section 6]*

1.29 Similarly, for the dominant purpose of an entity to be for the public benefit, the entity must have a purpose or purposes that are for the public benefit.

1.30 Further, for the purpose or purposes of an entity to be dominant, any other purposes of the entity must further or be in aid of, and be ancillary or incidental to the dominant purpose.

1.31 It may be that multiple charitable purposes for the public benefit, when taken together, form a dominant charitable purpose for the public benefit. Therefore, it is not necessary for an entity to show that a single purpose is their dominant purpose.

1.32 In determining the dominant purpose of an entity, items that may be considered include, but are not limited to:

- the constituent documents of the entity, if the entity has such documents; and
- the activities of the entity.

#### **Example 1.1**

An organisation operates a community centre providing care for the homeless. The centre provides food, accommodation and health care. In addition, the centre organises sporting activities for recreational purposes on an occasional basis for their clients. This organisation is funded through the sale of donated clothing.

This organisation would be considered to have a dominant charitable purpose. The dominant purpose includes both the advancement of social and community welfare, and the advancement of health. Both the sporting activities and the fundraising activities of the organisation would not be considered charitable when viewed in isolation. They are, however, both incidental and in aid of the dominant purpose as they are conducted on a small scale to assist with the wider purpose of the entity.

#### ***What is the public benefit***

1.33 With some exceptions [*Part 2, subsection 4(2)*], the dominant purpose of an entity must be for the public benefit if that entity is to fulfil the definition of a charity.

1.34 An entity has a purpose for the public benefit if it:

- is aimed at achieving a universal or common good;
- has practical utility; and
- is directed to the benefit of the general community or to a sufficient section of the general community.

*[Part 2, subsection 7(1)]*

1.35 A purpose is aimed at achieving a universal or common good where it is beneficial. A purpose that is harmful cannot, therefore, be aimed at achieving a universal or common good.

1.36 A benefit must have a practical utility. Benefits are not restricted to material benefits, but include social, mental and spiritual benefits.

1.37 A purpose directed to the benefit of the general community or to a sufficient section of the general community will not have a numerically negligible group as its potential beneficiaries. *[Part 2, subsection 7(2)]*

1.38 Any private benefits to the members of the charitable entity must be incidental to carrying out the charitable purpose. This does not preclude the provision of private benefits to members, but restricts this provision to the point where it is incidental to the overall purpose of the entity.

1.39 Further to this, the public benefit does not exist where there is a relationship between the donor and the beneficiaries (including either a family or an employment relationship).

**Example 1.2**

A company establishes a program whereby the employees are given regular health checks and health care advice. The company established the program for the benevolent purpose of improving the health and wellbeing of employees.

While the program has a dominant charitable purpose of the advancement of health, it would not meet the public benefit test, as there is a relationship between the donor (the company) and the beneficiaries (the employees).

***Exclusion from the public benefit test***

1.40 Open and non-discriminatory self-help groups and closed or contemplative religious orders that regularly undertake prayerful intervention at the request of members of the public are specifically excluded from the requirement to be for the public benefit. *[Part 2, subsection 4(2)]*

1.41 Open and non-discriminatory self-help groups are often organised and managed by the same group of people that benefit from the group. Where the self-help group meets the requirements of openness and non-discrimination, the benefit accruing to members would not exclude the group from meeting the definition of a charity on the basis that the

private benefit to members would not meet the public benefit test. They would, however, need to meet the remaining criteria of the definition, including being not-for-profit with a dominant charitable purpose.

### **Example 1.3**

An asthma sufferer forms a support group for asthma sufferers in her geographical area. The group is formed to provide a forum for discussing the difficulties in being an asthma sufferer and to share experiences and ideas related to being an asthma sufferer. In order to join the group, a person must be an asthma sufferer. Aside from this requirement, there is no other membership criteria.

This group would be considered an open and non-discriminatory self-help group.

1.42 Closed or contemplative religious orders are excluded from the public benefit test as they differ from churches, which seek to spread their religious belief. Where the religious order keeps their observances to themselves, but does undertake prayer at the request of the members of the public, it is not necessary to meet the public benefit test.

#### *Open and non-discriminatory self-help groups*

1.43 A self-help group is an association of individuals that is established for the purpose of assisting individuals affected by a particular disadvantage or discrimination, or by a need that is not being met. Purpose for which a group may be established include providing support to victims of crime, to those effected by a particular illness, or to those who have been discriminated against for a particular reason. *[Part 2, section 9]*

1.44 Open and non-discriminatory self-help groups are not required to meet the public benefit test. This is because the benefits from these groups are usually aimed at the members of the group, thereby suggesting that the private benefit derived by members is greater than would be considered appropriate under the public benefit test.

1.45 The exemption of these groups from the public benefit test recognises the valuable role of self-empowerment in addressing disadvantage, discrimination and need, as well as the role of members in these groups in assisting other persons suffering from the same problem. Self-help groups harness the experience of members to assist the group as a whole in dealing with the relevant disadvantage, discrimination and need.

1.46 In order to determine if a self-help group is open and non-discriminatory, the membership criteria of the group are of great

importance. The members of the group, including those who control the group, should be individuals who are affected by the disadvantage, discrimination or need that the group is established to address.

1.47 The criteria for membership will relate to the purpose of the group, with membership open to any individuals who satisfy those criteria. Membership should not, therefore, be based upon any additional criteria, such as election by existing members.

1.48 It is, therefore, the model of management of these groups that sets them apart from other charitable groups. The membership criteria ensures that the benefits provided by the group are open to the public or to a class of the public. The benefits of the group, however, are provided through the involvement of members, who help not only themselves, but the group generally.

***What is a disqualifying purpose?***

1.49 There are some purposes that are not considered to be consistent with the overall charitable character of an entity. These purposes are called disqualifying purposes. *[Part 2, section 8]*

1.50 The following are disqualifying purposes:

- illegal activities;
- advocating a political party or cause;
- supporting a candidate for political office; and
- attempting to change the law or government policy.

With the exception of illegal activities, the purpose will be a disqualifying purpose if it, either by itself, or when taken together with one or both of the other of these purposes, is more than ancillary or incidental to the other purposes of the entity concerned.

1.51 Any purpose of engaging in illegal activities is a disqualifying purpose.

1.52 The disqualifying purpose of engaging in illegal activities parallels the requirement that a charity does not engage in activities constituting a serious offence.

1.53 Purposes, as shown in paragraph 1.50, with the exception of illegal purposes, are only disqualifying purposes where they are more than ancillary or incidental to the other purposes of the entity concerned. It is

possible, therefore, for the entity to have purposes of these types, though they must further or be in aid of, and be ancillary or incidental to the dominant purpose of the entity.

1.54 Ordinarily, representing to Government, from time to time, the interests of those the entity seeks to benefit would be seen as incidental and in aid of the dominant purpose of the charity.

1.55 However, the independence of charities from Government and from political processes is an important component of their role in serving the public benefit.

### **Definition of a charitable purpose**

1.56 Part 3 of this bill defines a charitable purpose. The requirement of a dominant charitable purpose is a key feature of the core definition of a charity in Part 2 of this bill. *[Part 3, section 10]*

1.57 In addition, the definition of a charitable purpose stands alone, applying to all Commonwealth legislation, in the same manner as the definition of a charity.

#### ***Advancement***

1.58 The term ‘advancement’ includes protection, maintenance, support, research and improvement. *[Part 3, subsection 10(2)]*

#### ***Advancement of health***

1.59 The advancement of health has previously been accepted by the courts as a charitable purpose. The advancement of health is accepted as being charitable, without the restriction of health services being provided to the poor. *[Part 3, paragraph 10(1)(a)]*

1.60 The advancement of health includes both curative and preventative purposes and, without limitation, includes the following activities:

- the care, treatment and rehabilitation of sickness, disease and suffering in humans, including the care provided by acute care hospitals, acute care institutions such as alcohol and drug treatment centres, mental health institutions and community health services such as home nursing, alcohol and drug rehabilitation and patient transport services;

- the provision of public health services aimed at advancing the health of the general community or sections of the general community, including health promotion, nutrition services, immunisation and screening for diseases; and
- research related to the nature, prevention, diagnosis treatment and incidence of disease and other health problems, research into health services, nutritional problems, pharmacology and so on.

### ***Advancement of education***

1.61 The advancement of education has also been accepted by the courts as a charitable purpose and the Government considers that this interpretation should continue to apply. *[Part 3, paragraph 10(1)(b)]*

1.62 The advancement of education can occur irrespective of the age of the beneficiaries.

1.63 The advancement of education includes, without limitation, the following activities:

- the provision of formal education through preschools, schools and tertiary education institutions, including the provision of building and related educational facilities;
- research directed towards expanding human knowledge;
- informal education aimed at the development of citizenship and life skills;
- the support of education, such as through the provision of prizes and scholarships; and
- the provision and support of facilities and services integrally associated with the operation of education institutions, such as sporting facilities, student unions and parent organisations.

### ***Advancement of social and community welfare***

1.64 The relief of poverty has always been considered a significant area of charitable activity. The advancement of social and community welfare, while encompassing the relief of poverty, recognises that the services and benefits provided by charities in this area are far more broad. *[Part 3, paragraph 10(1)(c) and section 11]*



1.65 The advancement of social and community welfare includes material, psychological, social and relational needs, and recognises relief, prevention and intervention.

1.66 While assistance to individuals is well recognised as charitable, 'community' has been specifically included in the title to recognise the role of charities in promoting the welfare of whole communities. Included here is promotion of social cohesion, inclusiveness, diversity, the productive functioning of groups within the broader community and the fostering of community capacity building.

1.67 The advancement of social and community welfare includes, without limitation:

- the prevention and relief of poverty, distress or disadvantage of individuals or families;
- the care, support and protection of the aged and people with a disability, including the provision of residential and non-residential care;
- the care, support and protection of children and young people and, in particular, the provision of child care services;
- the provisions of services to support families;
- the provisions of assistance and support for indigenous people, refugees and immigrants and prisoners and their relatives;
- the provisions of assistance and support for people who are disadvantaged in the labour market;
- the relief of distress caused by natural disasters and sudden catastrophes;
- the promotion of community development to enhance social and economic participation;
- the care and support of members or former members of the armed forces and their families; and
- the care and support of members of the civil defence forces and their families during a time of emergency (civil defence forces includes emergency service and crews of merchant

ships or other private vessels or aircraft used in times of emergency).

### ***Advancement of religion***

1.68 The advancement of religion has been considered a charitable purpose throughout the history of charity law. [*Part 3, paragraph 10(1)(d) and section 12*]

1.69 In the major High Court case regarding the meaning of religion, *The Church of New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120, Wilson and Deane JJ. held that the following principles could be used as indications in determining whether a collection of ideas and practices constitute a religion.

- The ideas and practices involve belief in the supernatural.
- The ideas relate to people's nature and place in the universe and their relation to things supernatural.
- The ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance.
- However loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups.
- The adherents themselves see the collection of ideas and practices as constituting a religion.

1.70 In the same case, Mason ACJ. and Brennan J. held, similarly, that a religion involves:

- belief in a supernatural Being, Thing or Principle; and
- the acceptance of canons of conduct in order to give effect to that belief.

1.71 In addition, the courts have also found<sup>1</sup> that organisations working against religions or the idea of religion cannot in itself be a religion.

---

<sup>1</sup> *Bowman v Secular Society Ltd* 1917 AC 406 and *Re Jones* 1907 SALR 1990 (Incorporated Body of Freethinkers of Australia).

1.72 The current interpretation demonstrates the current broad understanding of what constitutes a religion. As this understanding of religion continues to develop, so will the meaning of the charitable purpose of the advancement of religion. The courts will continue to be the best guide as to the current meaning.

***Advancement of culture***

1.73 The advancement of culture has not previously been recognised as a distinct area of charitable endeavour. Instead, the purposes that might have been considered for the advancement of culture were required to fit within the advancement of education.

1.74 As such, the courts have, in the past, accepted that purposes directed towards increasing the public appreciation of art, music or literature were charitable. This demonstrates the general understanding of the educational purpose of culture. It did, however, require that for a cultural purpose to be considered charitable, it must have had demonstrable educational merit.

1.75 A separate category specifically for the advancement of culture will overcome this, with cultural purposes assessed only on their cultural merit. *[Part 3, paragraph 10(1)(e)]*

1.76 The establishment of a separate cultural category recognises the important role of culture in determining a national identity and in enriching the lives of individuals and of society as a whole.

1.77 The advancement of culture includes, without limitation:

- the promotion of and participation in the arts, including literature, music, the performing arts and visual arts (including the various art forms currently recognised on the Register of Cultural Organisations under Subdivision 30-F of the *Income Tax Assessment Act 1997*);
- the establishment and maintenance of public museums, libraries and art galleries, and moveable cultural heritage;
- the promotion of Australian indigenous culture and customs;
- the promotion of the culture and customs of various language and ethnic groups; and
- the protection and preservation of national monuments, areas of national interest and national heritage sites and buildings.

***Advancement of the natural environment***

1.78 The establishment of a specific category for the advancement of the natural environment recognises the increased value society places on the natural environment. In particular, this category recognises the unique value of Australia's native natural environment. *[Part 3, paragraph 10(1)(f)]*

1.79 In the case of many environmental purposes, the public benefit is clearly demonstrated. Given the status of many environmental assets as public goods, any benefit to one, is a benefit freely available to all.

***Other purposes beneficial to the community***

1.80 Of key importance in the legislation of a definition of a charity is the need for flexibility, to allow the meaning of a charity and a charitable purpose to adapt to the ongoing changes in society.

1.81 This flexibility is provided by the inclusion of an 'other' category in the definition of a charitable purpose. *[Part 3, paragraph 10(1)(g)]*

1.82 In addition, the category also includes a number of charitable purposes that do not readily lend themselves to being grouped. Two examples of these types of purposes are the advancement of animal welfare and of public safety – both purposes clearly understood both by the courts and by the community to be important charitable purposes.

1.83 In determining the purposes that will fall under this category, the term 'beneficial to the community' is given prime importance. The other six categories of charitable purposes have been included on the basis that they represent a significant benefit to the community. Consistent with that, should any other purposes be considered to similarly have a significant benefit to the community, then they should be included within this category.

1.84 The following are examples of some of the types of purposes that will fall under 'other purposes beneficial to the community':

- the promotion and protection of civil and human rights;
- the promotion of reconciliation, mutual respect and tolerance between various groups of people within Australia;
- the protection and safety of the general public; and
- the prevention and relief of suffering of animals.

## **Application and transitional provisions**

1.85 The definition will apply from 1 July 2004. *[Part 1, section 2]*

---

# ***Index***

---

## **Part 1: Preliminary**

<i>Bill reference</i>	<i>Paragraph number</i>
Section 2	1.85
Subsection 3(1)	1.13, 1.16, 1.18

## **Part 2: Charities**

<i>Bill reference</i>	<i>Paragraph number</i>
Section 4	1.11
Subsection 4(2)	1.33, 1.40
Section 5	1.25
Section 6	1.28
Subsection 7(1)	1.34
Subsection 7(2)	1.37
Section 8	1.49
Section 9	1.43

## **Part 3: Charitable purpose**

<i>Bill reference</i>	<i>Paragraph number</i>
Section 10	1.56
Paragraph 10(1)(a)	1.59
Paragraph 10(1)(b)	1.61
Paragraph 10(1)(c) and section 10	1.64
Paragraph 10(1)(d) and section 11	1.68
Paragraph 10(1)(e)	1.75
Paragraph 10(1)(f)	1.78
Paragraph 10(1)(g)	1.81
Subsection 10(2)	1.58

## Appendix 3: Group meetings held

---

<b>Meetings conducted with the cooperation and assistance of:</b>	<b>Location:</b>	<b>Date:</b>
Australian Council of Social Service	Sydney, NSW	13 August 2003
Charities Consultative Committee	Sydney, NSW	15 August 2003
Western Australian Council of Social Service	Perth, WA	19 August 2003
Tasmanian Council of Social Service	Hobart, TAS	25 August 2003
Victorian Council of Social Service	Melbourne, VIC	26 August 2003
Australian Council For Overseas Aid	Melbourne, VIC	26 August 2003
Australian Council For Overseas Aid	Sydney, NSW	27 August 2003
Australia Council	Sydney, NSW	27 August 2003
Health and Aged Care Groups	Canberra, ACT	28 August 2003
Independent Schools Council of Australia	Canberra, ACT	28 August 2003
Queensland Council of Social Service	Brisbane, QLD	1 September 2003
Tax Practitioners Group	Sydney, NSW	3 September 2003
Mittagong Forum (Environmental Groups)	Melbourne, VIC	4 September 2003
New South Wales Council of Social Service	Sydney, NSW	5 September 2003
Australian Capital Territory Council of Social Service	Canberra, ACT	8 September 2003
Australian Council of Social Service	Canberra, ACT	8 September 2003
Philanthropy Australia	Sydney, NSW	9 September 2003
Refugee Council of Australia & Federation of Ethnic Communities of Australia	Sydney, NSW	10 September 2003
South Australian Council of Social Service	Adelaide, SA	11 September 2003
Northern Territory Council of Social Service	Darwin, NT	15 September 2003





## Appendix 4: Submissions received

---

ACROD Limited

Action on Disability within Ethnic Communities Incorporated

Aged & Community Services Association of New South Wales & the Australian Capital Territory

Aged & Community Services Australia

Alcohol and other Drugs Council of Australia

Alzheimer's Australia

Ambulance Service Victoria

Anglican Church Diocese of Sydney

Anglicare Australia

Animal Welfare League of South Australia

Animals Australia

Arnold Bloch Leibler

Artists Foundation of Western Australia

Arts Law Centre of Australia

Association of Independent Schools of Queensland Incorporated

Association of Independent Schools of Western Australia Incorporated

Association of Neighbourhood Houses and Learning Centres Incorporated

Association of Western Australian Art Galleries

Asylum Seekers Centre Incorporated

Australasian Fire Authorities Council Incorporated

Australia Council

Australia Council of U3As Incorporated

Australian Agency for International Development (AusAID)

Australian Association of Christian Schools

Australian Breastfeeding Association

Australian Caption Centre

Australian Council for Overseas Aid (ACFOA)

Australian Council of National Trusts

Australian Council of Social Service (ACOSS)

Australian Democrats

Australian Divisions of General Practice Limited

Australian Federation of AIDS Organisations

Australian Federation of Homelessness Organisations

Australian Flying Corps and Royal Australian Air Force Association

Australian Injecting & Illicit Drug Users League Incorporated

Australian Institute of Aboriginal and Torres Strait Islander Studies

Australian Legal Aid Commissions

Australian Major Performing Arts Group

Australian Network of Environmental Defender's Offices

Australian Paralympic Committee

Australian Pensioners' and Superannuants' League Queensland

Australian Red Cross

Australian Relief & Mercy Services Limited

Australian Reproductive Health Alliance

Australian Vice Chancellors' Committee

Australians for Native Title and Reconciliation

Aviation Historical Society of Australia Incorporated

Bailey, Zelda

Baptistcare

Baptist Community Services

Baptist World Aid Australia

Benevolent Society

Berry Street Victoria

Blind Citizens Australia

Blue Mountains Community Interagency

B'Nai B'Rith Australia/New Zealand

Boffa, G

Breast Cancer Action Group (New South Wales / Victoria)

Brotherhood of St Laurence

Brownsey, David

Bruderhof Communities in Australia Limited

Bryan, Michael

Bunney, Bob

CAF Australia

Cancer Council Australia

Cancer Council New South Wales

Cancer Council South Australia

Cancer Council Victoria

Cancer Voices New South Wales

Carers Australia

Caroline Chisholm Centre for Health Ethics Incorporated

Catholic Church in Australia

Caxton Legal Centre Incorporated

Central and Northern Land Councils

Central Highlands Community Legal Centre Incorporated

Cerebral Palsy League of Queensland

Chesterman, Michael

Child & Family Welfare Association of Australia Incorporated  
Chinese Australian Services Society Co-operative Limited  
Christian Children's Fund  
Christian World Service  
Church and Charitable Private Hospitals Association Limited  
Church of Jesus Christ of Latter-Day Saints  
City of Bunbury  
City of Mandurah Sub-Branch Returned and Services League  
City of Melville  
City of Salisbury  
Combined Pensioners and Superannuants Association of New South Wales  
Community Child Care  
Community Cultural Development New South Wales  
Community Housing Federation of Australia  
Community Information Strategies Australia Incorporated  
Community Services Committee of the New South Wales Young Lawyers  
Congregation of the Temple Emanuel  
Co-operative Federation of Victoria Limited  
Council of Social Service of New South Wales (NCOSS)  
Country Fire Authority  
Court, John  
Cutler Hughes Harris  
Darwin Young Women's Christian Association  
Davidson, Alexander (Sandy)  
DeafBlind Association of South Australia  
Deafness Association of the Northern Territory Incorporated  
Deafness Forum of Australia

Deloraine Country Housing Co-operative Society Limited  
Department of Agriculture, Fisheries and Forestry  
Department of Communications, Information Technology and the Arts  
Department for Community Development, Western Australia  
Department of Environment and Heritage  
Department of Family and Community Services  
Department of Health and Ageing  
Disability Justice Advocacy  
Edmund OutReach Services Association  
Emil Ford & Co  
Environment Business Australia  
Environment Centre Northern Territory  
Epworth Hospital  
Ernst & Young  
Ethnic Communities Council of Queensland  
Family Based Care  
Family Life Association of South Australia Incorporated  
Far North Queensland Information Alliance  
Federation of Community Legal Centres (Victoria) Incorporated  
Federation of Parents and Citizens' Associations of New South Wales  
Fire and Emergency Services Authority of Western Australia  
Fitzroy Legal Service  
Ford, Reverend Dr Norman  
FPA Health  
Freehills  
Fundraising Institute – Australia Limited  
Gillin, Loris Olwyn

Girls' Brigade Australia Incorporated  
Good Shepherd Youth and Family Service  
Group Training Australia  
Guide Dogs New South Wales/ Australian Capital Territory  
Hall & Wilcox  
Heritage Council of New South Wales  
History Council of New South Wales  
Holmes, Peter  
Human Rights Council of Australia  
Human Rights Western Australia Incorporated  
Humanist Society of South Australia Incorporated  
Humanist Society of Victoria Incorporated  
Illawarra Legal Centre Incorporated  
Immigrant Women's Speakout Association of New South Wales  
Independent Schools Council of Australia  
Inner City Legal Centre  
Institute of Chartered Accountants in Australia  
Institute of Public Affairs  
International Fund for Animal Welfare  
James Brown Memorial Trust  
Job Futures  
Katoomba Neighbourhood Centre Incorporated  
Kindergarten Parents Victoria  
Lee, W.A. (Tony)  
Legacy Co-ordinating Council Incorporated  
le Marchant, Antoinette  
Lifeline Australia Incorporated

Makinson & d'Apice

Melbourne Citymission

Melbourne Community Foundation

Mental Health Association New South Wales Incorporated

Mental Illness Fellowship of Australia Incorporated

Missions Interlink

Moreland City Council

Morgan, John

Morris, Wesley John

Motor Neurone Disease Association of Victoria Incorporated

Multicultural Disability Advocacy Association of New South Wales

Multiple Sclerosis Australia

National Aboriginal and Torres Strait Islander Ecumenical Commission

National Anglican Resources Unit

National Association for Prevention of Child Abuse and Neglect Incorporated, New South Wales

National Association of Community Legal Centres

National Council of the YMCAs of Australia

National Ethnic Disability Alliance

National Heart Foundation of Australia

Nature Conservation Society of South Australia

Neighbourhood Houses

New South Wales Combined Community Legal Centres Group

New South Wales Council of Churches

New South Wales Jewish Board of Deputies

New South Wales Treasury

New South Wales Volunteer Rescue Association Incorporated

Nimbin Neighbourhood & Information Centre Incorporated

Northern Territory Council of Social Service (NTCOSS)

O'Connell, Ann (member of Advisory Panel to Board of Taxation)

Orr, J. Geoff

Oxfam Community Aid Abroad

Patterson, K.J.

Peakcare Queensland

Peninsula Community Legal Centre Incorporated

People with Disabilities (Western Australia) Incorporated

People with Disability Australia Incorporated

Philanthropy Australia

Playgroup Association of Queensland

Presbyterian Church of Australia

Price, David H

Purple Economy Watch Incorporated

Quaker Service Australia

Queensland Cancer Fund

Queensland Community Housing Coalition Limited

Queensland Council of Parents and Citizens Associations

Queensland Council of Social Service (QCOSS)

Queensland Government – Treasury

Queensland Institute of Medical Research

Queensland Meals on Wheels Services Association Incorporated

Refugee Council of Australia

Registrar of Aboriginal Corporations

Reichstein Foundation

Returned & Services League of Australia Limited



Royal Blind Society

Royal Children's Hospital Foundation

Royal Life Saving Society Australia

RSPCA Australia

Russell, Ruth

Salvation Army

Save-a-Dog Scheme

Save the Children

Scouts Australia Western Australian Branch

Seventh-Day Adventist Church

Sherman Group Limited

Shire of Derby/West Kimberley

Smith Family

Social Developers' Network and Nurturing Evolutionary Development Foundation

Society of Australian Genealogists

South Australian Association of School Parents' Clubs Incorporated

Southern Communities Advocacy, Legal Education Service Incorporated

South West Aboriginal Land and Sea Council

SPARK Resource Centre Incorporated

St Vincent de Paul Society National Council

State Heritage Authority

Surf Life Saving Australia Limited

Tandara Lodge Community Care Incorporated

Tasmanian Council of Social Service Incorporated (TasCOSS)

Tasmanian Government

Taxation Institute of Australia

Timber Communities Australia

Turning Point Alcohol and Drug Centre

UNICEF Australia

Union Aid Abroad – APHEDA

UnitingCare Australia

Uniting Healthcare

University of Melbourne Postgraduate Association

Victorian Council of Social Service (VCOSS)

Victorian Healthcare Association

Victorian Urban Fire Brigades' Association Incorporated

Victorian Women's Refuges & Assoc. Domestic Violence Services Incorporated

Victorian Women's Trust

Victory Community Services

Volunteering Australia

Volunteering South Australia

Volunteering Tasmania Incorporated

Welfare Rights Centre Incorporated

WESTCARE Incorporated

Western Australian Council of Social Service (WACOSS)

Western Australian Local Government Association

Western Institute of Self Help (WISH) Incorporated

Western Suburbs Legal Service Incorporated

Willcox, B.A. (Bill)

Women with Disabilities Australia

Women's Health New South Wales

Women's Health Victoria

World Vision of Australia

Young Women's Christian Association (YWCA) of Australia

Young Women's Christian Association of Sydney

Youth Advocacy Centre Incorporated



## Appendix 5: Members and Charter of the Board of Taxation, conflict of interest declaration

---

### Members

The members of the Board of Taxation are:

#### Chairman

Mr Richard F.E. (Dick) Warburton

#### Members

Mr John Bronger

Mr Tony D'Aloisio

Mr Brett Heading

Mr Chris Jordan

Ms Jane Schwager

#### Ex officio members

Mr Michael Carmody (Commissioner of Taxation)

Dr Ken Henry (Secretary to the Department of the Treasury)

Ms Hilary Penfold, QC (First Parliamentary Counsel)

### Secretariat

Members of the Board's Secretariat who contributed to this report were Mr Gerry Antioch (former Secretary), Mr Mike Kooymans (acting Secretary), Mr Geoff Walton, Ms Angela McNally and Ms Michelle Bender.

### Charter

#### Mission

Recognising the Government's responsibility for determining taxation policy, and the statutory role of the Commissioner of Taxation, to contribute a business and broader community perspective to improving the design of taxation laws and their operation.

#### Membership

The Board of Taxation will consist of up to ten members.

Up to seven members of the Board will be appointed, for a term of two years, on the basis of their personal capacity. It is expected that these members will be appointed from within the business and wider community having regard to their ability to contribute at the highest level to the development of the tax system. The Chairman will be appointed from among these members of the Board. Members may be reappointed for a further term.

The Secretary to the Department of the Treasury, the Commissioner of Taxation and the First Parliamentary Counsel will also be members of the Board. Each may be represented by a delegate.

## Function

The Board will provide advice to the Treasurer on:

- the quality and effectiveness of tax legislation and the processes for its development, including the processes of community consultation and other aspects of tax design;
- improvements to the general integrity and functioning of the taxation system;
- research and other studies commissioned by the Board on topics approved or referred by the Treasurer; and
- other taxation matters referred to the Board by the Treasurer.

## Relationship to other Boards and Bodies

From time to time the Government or the Treasurer may establish other boards or bodies with set terms of reference to advise on particular aspects of the tax law. The Treasurer will advise the Board on a case by case basis of its responsibilities, if any, in respect of issues covered by other boards and bodies.

## Report

The Chairman of the Board will report to the Treasurer, at least annually, on the operation of the Board during the year.

## Secretariat

The Board will be supported by a secretariat provided by the Treasury, but may engage private sector consultants to assist it with its tasks.

## Other

Members will meet regularly during the year as determined by the Board's work program and priorities.

Non-government members will receive daily sitting fees and allowances to cover travelling and other expenses, at rates in accordance with Remuneration Tribunal determinations for part-time public offices.

The Government will determine an annual budget allocation for the Board.

## Conflict of interest declaration

All members of the Board are taxpayers in various capacities. Some members of the Board derive income from director's fees, company dividends, trust distributions or as a member of a partnership.

The Board's practice is to require members who have a material personal interest in a matter before the Board to disclose the interest to the Board and to absent themselves from the Board's discussion of the matter, including the making of a decision, unless otherwise determined by the Chairman (or if the Chairman has the interest, the other members of the Board).

The Board does not regard a member as having a material personal interest in a matter of tax policy that is before the Board merely because the member's personal interest may, in common with other taxpayers or members of the public, be affected by that tax policy or by any relevant Board recommendations.





## Appendix 6: Glossary of abbreviations

---

ATO	Australian Taxation Office
[the] Board	The Board of Taxation
CDI Report	Report of the Inquiry into the Definition of Charities and Related Organisations
CGT	Capital Gains Tax
Charities Bill/The Bill	Exposure Draft of the Charities Bill 2003
DGR	Deductible Gift Recipient
EM	Explanatory Material on Exposure Draft of the Charities Bill 2003
FBT	Fringe Benefits Tax
GST	Goods and Services Tax
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
ITEC	Income Tax Exempt Charity
NZ	New Zealand
OECD	Organisation for Economic Cooperation and Development
PBI	Public Benevolent Institution
PR No. 49	Treasurer's Press Release No. 49 of 29 August 2002
UK	United Kingdom
UN	United Nations
US	United States of America



## Appendix 7

ATO Minute No: 480/2003





**Australian Government**  
**Australian Taxation Office**

# ATO Minute No: 480/2003

**To:** Gerry Antioch, Treasury  
**Copies To:** Rona Mellor, ATO.  
Deirdre Gerathy, Treasury.  
**Date:** 16 October 2003  
**Your reference:**  
**Reply Date:** N/A  
**Contact Officer:** Brett Peterson  
**Subject:** **Definition of Charity**

**From:** Brett Peterson  
**BSL:** Small Business  
**Section:**  
**Our reference:** 2003/07889  
**Contact Phone No:** 02 6216 1185  
**Contact Fax No:** 06 6216 2599

---

## Purpose

1. I am writing to provide a response to questions posed by the Board of Taxation's Charities Definition Working Group in relation to the practical application of the definition of a charity and related issues.

## Action

2. Responses are attached for your information.

Brett Peterson  
Assistant Commissioner  
Small Business

## **RESPONSES TO REQUEST FROM CHARITIES DEFINITION WORKING GROUP ON THE PRACTICAL APPLICATION OF THE DEFINITION OF A CHARITY AND RELATED ISSUES**

### **THE TAX OFFICE APPROACH TO DETERMINING CHARITABLE PURPOSE/ADMINISTERING ENDORSEMENT GUIDELINES**

1. The Charities Definition Inquiry Report cites, at p102, Draft Taxation Ruling TR 1999/D21 in relation to determining the purpose of a particular charitable fund or institution.
2. In relation to charitable funds, the draft ruling states that the ‘purpose of a charitable fund is found by reference to the terms of its constituent documents’. This approach is considered appropriate for funds (as opposed to institutions) as they are mainly restricted in their activities to managing trust property and making distributions.
3. On the other hand the approach to determining the purpose of charitable institutions is necessarily broader as institutions have more scope for undertaking a range of activities in fulfilling their charitable purpose(s). For this reason the draft ruling, as cited by the Inquiry Report, states that, ‘finding an institution’s sole or dominant purpose involves an objective weighing of all its features.’ This includes consideration of constituent documents, any legislation governing operation, activities, history and control, policies and plans, administration and finances.
4. The endorsement process is administered on the basis of the application of the law to all the facts/features in each case - on the merits of each case. No one feature by itself will be necessarily conclusive. Consideration of all relevant information is necessary to understand whether the institution, at the relevant time, is established predominantly for charitable purposes. Determination of the dominant purpose is a question of fact. This means taking into consideration all relevant information including stated objects, activities and financial information in order to assess the organisation’s entitlement to endorsement. Determining the main purpose by reference to the activities, or giving undue emphasis to the activities, is not appropriate, as activities by themselves will not reflect the dominant purpose.
5. The appropriateness of such a balanced approach is illustrated by the High Court’s decision in *Royal Australasian College of Surgeons v FC of T* (1943) 68 CLR 436, where the issue was whether the college was a scientific institution. To determine the dominant purpose, the Court considered the objects in the constituent documents and also its activities.
6. It is not envisaged that there will be any change to this process under the proposed law. An organisation’s entitlement to charitable status will remain a matter of considering all the relevant facts and applying the law to those facts, in a fair and consistent manner.
7. The Tax Office approach has been, and remains, open and direct in our dealings. We document and publish our views on the application of the law through our publications and public rulings and on the web.

**Does the Tax Office approach differ from the common law?**

8. The Tax Office approach is to apply the law, as we understand it to be, in a fair and consistent manner. In the absence of specific legislative direction on issues concerning the definition of a charity, we are obliged to follow the common law interpretation.

**What weight does the tax office give to constituent documents in comparison to other criteria?**

9. Draft Taxation Ruling TR 1999/D21 sets out the Tax Offices' views about the circumstances in which an organisation will be found to be charitable and how to determine whether the dominant purpose is charitable.
10. No single factor is taken as a sole indicator of the dominant purpose. Finding an organisation's dominant purpose is a matter of objectively weighing up all of its features, including its objects, activities, finances, etc. But, no organisation whose constituent documents fail to reflect a dominant charitable purpose would be endorsed.

**What guidelines does the tax office provide charities to enable them to determine whether they have a charitable purpose?**

11. The Tax Office has documented and published its views on the law and its application in various publications and on the web. They include the *Income tax guide for non-profit organisations* and Draft Taxation Ruling TR 1999/D21 as well as factsheets and information on the web that assists organisations to work out whether they are charities. We would be please to provide a person to take the Working Group through the range of material provided, and available on the web, if that would be useful.

**WOULD CHARITIES BE REQUIRED TO KEEP DETAILED RECORDS OF THEIR ADVOCACY ACTIVITIES IN RELATION TO SECTION 8 OF THE DRAFT CHARITIES BILL?**

12. The concern that charities will face the additional burden of being required to keep detailed records of their advocacy activities is entirely misplaced. No additional records will be needed.
13. One of the features of the endorsement regime is self-review. It flows from the statutory requirement for organisations to inform the Tax Office if they cease to be entitled to endorsement. The Tax Office recommends that charities undertake self-reviews on a yearly basis or whenever there is a major change in the organisation's structure or operations. We recommend, as part of their self-review, that organisations take into account their stated objects, activities, finances and so on. We also recommend that they document the review and its outcome. The Tax Office has provided a template for recording self-reviews in its publication *Income tax guide for non-profit organisations*.
14. The requirements of the proposed law, if enacted (including disqualifying purposes in the proposed clause 8) would become part of the matters for consideration during self-reviews, to the extent they are not already.

15. In the event that the Tax Office initiates a review of an organisation's charity status, similar information to that required for self-review would be needed.
16. The Tax Office does not review and does not intend to review every endorsed charity's status. For non-profit organisations, the Tax Office's primary approach to managing the revenue system is 'relationship management, combined with help and education services' (*Compliance program 2003-2004* at page 31). This approach is consistent with non-profit organisations being 'highly compliant by nature' but often with low levels of knowledge about the tax system.
17. Where particular risks are identified, the Tax Office undertakes help and audit programs as appropriate. Any programs are guided by the *Taxpayers' Charter* and the Compliance Model. The *Charter* is about being open and fair in our treatment of people, within the framework set by the law. The Compliance Model emphasises the developing of appropriate and proportionate responses to compliance behaviour.

**WOULD THE INCLUSION OF PARAGRAPHS 8(2)(a) AND (c) AS PROPOSED IN THE CHARITIES BILL CHANGE THE WAY THE TAX OFFICE ASSESSES WHETHER THE ADVOCACY ROLE OF CHARITIES IS MORE THAN ANCILLARY OR INCIDENTAL?**

18. The courts, in relation to charities, have not developed prescriptive rules for deciding whether particular purposes are ancillary or incidental to charitable purposes. It is in an objective weighing of all the relevant facts of each individual case that lead to determination of the matter. Following the approach taken by the courts, the Tax Office has not sought to substitute or impose mechanical tests, activity tests, percentages, black-letter rules, and the like in relation to assessing whether particular purposes are ancillary or incidental to the dominant purpose of an organisation.
19. Our understanding of the Exposure Draft of the Charities Bill (and in this it appears to follow the *Report of the Inquiry into the Definition of Charities and Related Organisations*) is that it, too, does not adopt such tests or rules. Rather, the proposed section 8 uses the terms 'purpose', 'ancillary' and 'incidental'. These terms have not been defined in the Bill and the context of their use – in that clause and in other clauses – does not indicate a meaning different to that which they otherwise bear. For this reason we expect they would have the meaning, sense and application currently in use and as may be determined by the courts in the future.
20. Accordingly, given that the existing law and the Charities Bill both operate in terms of charitable purpose(s) and of certain purpose(s) in so far as they are ancillary or incidental to charitable purposes, we do not see that there would be a difference in approach.
21. In terms of finding whether there are purposes of 'advocating a political party or cause' or 'attempting to change the law or government policy', the expressions 'advocacy' and 'systemic advocacy' are not determinative. Some advocacy purposes could be caught and other advocacy purposes fall outside. Indeed many sorts of advocacy purposes of peak bodies, welfare bodies and overseas aid organisations could be envisaged that would not be caught. For example, an overseas aid organisation may seek to conduct a fund raising drive for starving children overseas, and as a part of that activity, raise public awareness by distributing leaflets or writing letters to the newspaper.



## **Specific examples**

22. The examples given are as follows:

- a) Peak bodies that have assumed an advocacy and policy role on behalf of their members.
- b) Welfare Rights Centres or Disability Advocacy bodies whose main objectives include systemic advocacy as well as advocacy on behalf of individuals.
- c) Overseas aid organisations where advocacy is an integral part of their purpose and activities.

23. On the three examples given, in terms of the requirements of paragraphs 8(2)(a) and (c) of the Charities Bill, no definite conclusions can be drawn – due to insufficient information.

24. The application of sub-section 8(2) is predicated on there being a purpose. For example, while an organisation might hire employees, and do so on a regular and recurrent basis using a substantial part of its budget in paying them, it would be unlikely that in the charity context it could be described as having a purpose of hiring and employing employees. More likely these activities would be merely a means of carrying out some purpose like, for example, educating children or propagating the Gospel.

25. So, while an organisation might often have meetings with government ministers and bureaucrats and prepare memoranda to influence them, more information about the relationship of these activities to the purpose(s) of the organisation would be needed to determine whether the organisation had a purpose of doing such things, or that doing these things was merely ancillary or incidental to the organisation's charitable purpose(s).

## **HOW DOES THE TAX OFFICE CURRENTLY GIVE EFFECT TO THE COMMON LAW**

### **The interpretation of the terms 'ancillary' and 'incidental'**

26. The concepts of 'ancillary' and 'incidental' are not new in this area.

27. The Tax Office view, explained in Draft Taxation Ruling TR 1999/D21 and based on court decisions in relation to charities, does not seek to apply prescriptive rules for deciding whether particular purposes are incidental or ancillary to the main or dominant charitable purpose(s). It is a matter of weighing up all relevant features to assess whether certain purposes are ancillary or incidental.

28. The presence or scale of particular activities, such as advocacy activities, is not in itself an indication or confirmation that those activities form a purpose in their own right or that they form the main or dominant purpose of an organisation. While an organisation might engage in advocacy activities, these activities may be the means by which the main or fundamental charitable purpose(s) of the organisation are achieved.

### **Have any income tax exempt charities lost their status as a result of an examination of their advocacy role?**

29. I am unaware of any recent, specific cases where endorsement has been revoked on the basis of an organisation's role in advocacy.

30. Whether the status of an income tax exempt charity should be revoked would be determined by their loss of entitlement to status. This can occur either by the organisation itself advising the Tax Office that it no longer qualifies for entitlement or by a review initiated by the Tax Office. A decision in these cases would be on a case-by-case basis and determined on the merits of each case.
31. The initial endorsement process, in the year 2000, saw thousands of applications received and processed over a few months, which meant that if an organisation had previously been recognised by the Tax Office as having a particular status, endorsement was granted, in the absence of any contrary evidence. However, if organisations believe that they are no longer entitled to income tax exempt charity status due to their advocacy role, or the Tax Office receives information which, upon further examination, confirms the advocacy role as dominant, it is likely that the status will be revoked. Any such action would ordinarily be taken after the organisation has been notified of the impending revocation.

**How does the tax office apply or view decisions such as the ACF and Public Trustee cases that appear to support a significant advocacy role as legitimate?**

32. We believe that the above cases are essentially consistent with the Tax Office view. The ACF decision is considered to confirm the Tax Office's approach with regard to the determination of the dominant purpose of an organisation. In this case, it was held the ACF was established for the purposes of public benefit and any objective or strategy that may be described as political was ancillary or incidental.
33. The Public Trustee decision is different as the issue was whether a trust was established for charitable purposes in view of the fact that the beneficiary had mixed objects - charitable and political. It was held that the beneficiary's charitable objects could be separated from its political objects, and the political objects disregarded, pursuant to the Charitable Trusts Act 1993, so as to confirm the charitable intention of the testator in making the bequest. In any case, the beneficiary was considered to be carrying out activities directed to advancing charitable objects through means which sought to influence public opinion, that is, the 'political' purposes were in aid or furtherance of the charitable purpose. Pragmatically, it is unsurprising that a court would generally prefer to uphold a charitable bequest.
34. The Tax Office seeks to apply the law in a fair and consistent manner with a view to aligning endorsement to entities that are actually entitled. The Tax Office view with regard to the law and its practices are well documented and published. This is in keeping with our approach of being open and fair in our treatment of people and working with the community to understand the law and our mutual obligations and responsibilities. But, we do challenge decisions that are, in our view, anomalous, and we do advance issues for judicial clarification (often with test case funding going to the affected organisation).

**DOES THE TAX OFFICE BELIEVE THE CHARITIES BILL PROVIDES IT WITH GREATER CLARITY IN ITS ROLE AS THE CURRENT ADMINISTERING AGENCY?**

35. .No significant greater clarity is provided.

36. The proposed Bill makes express the range of matters that might amount to charitable purposes. But, the difficulty of administration is the determination of the existence, or not, of the relevant purpose. The proposed Bill, in codifying the existing law, leaves in place all of the existing administrative difficulties.
37. 'Judgment calls' about status involve a balancing of competing (and sometimes conflicting) facts. The creation of clearer, harder 'edges', such as setting percentages or proportions would help to ease the issue, and make decisions simpler to explain.

#### **DOES THE TAX OFFICE BELIEVE THE CHARITIES BILL PROVIDES GREATER CLARITY TO CHARITIES?**

38. Yes, to the extent it puts the definition into a contemporary piece of legislation that people can readily obtain and read for themselves. In other words, the proposed Bill has the advantage of de-mystifying the definitional issue. This may have a small flow on benefit to the Tax Office in easing some elements of explaining decisions.

#### **HOW DOES THE TAX OFFICE PROPOSE TO ADMINISTER THE SERIOUS OFFENCE PROVISION OF THE CHARITIES BILL?**

39. Pragmatically, the Tax Office could be expected to ask about this issue on the endorsement application, and to follow up any instances that come to attention. On present indications, it appears that the risk in this issue is unlikely to be sufficient to warrant specific compliance activity on other than individual cases. The Tax Office would be inclined to rely on actual convictions, rather than institute investigations itself.
40. Actual conviction of a relevant offence would lead to refusal or revocation of endorsement.
41. Information leading the Tax Office to believe that a serious offence may have been committed would be referred to law enforcement authorities. In the case of an alleged offence for which a charge has been laid, it is unlikely that endorsement would be granted. For charities already holding endorsement:
- for alleged offences that go to the heart of the charitable operations, it is likely that endorsement would be revoked from the time a charge was laid; and
  - for other offences, it is likely that any decision to revoke endorsement would be delayed until the criminal matter has been decided.
- (In all cases, once the criminal matter has been decided, it is open to the Tax Office to backdate the time of endorsement in appropriate cases, to achieve a fair outcome)
42. On present indications, regulations are probably not necessary.
43. The operation of the proposed provision is absolute in expression, in that once the proscribed behaviour has been engaged in, then entitlement to charitable status would seem to be forever lost. Whether or not the offence is handled on indictment or summarily is not relevant. The issue is whether the offence is indictable, under the relevant law – this could vary between jurisdictions. In other words, an indictable offence that can, and is, handled summarily, would be caught by the proposed provisions.
44. Any entitlement to review of a decision on this issue would be attached to the tax consequences of the finding of such behaviour. That is, endorsement would be refused or

revoked. That decision then gives rise to an entitlement to objection (internal, but independent, Tax Office review), with appeal to the AAT or Federal Court, at the applicant's discretion. All administrative law and other remedies whereby the courts can exercise a supervisory jurisdiction over the Tax Office would of course also be available.

### **Specific example**

45. The specific example put was of an entity found to have committed an OH&S offence that could be treated as an indictable offence but is treated as a summary offence.
46. The example organisation could not be considered charitable, and could not in the future be considered charitable. The organisation would consequently lose its entitlement to endorsement for tax purposes, and could not again be endorsed.
47. As an aside however, it is relevant to note that offences in the OH&S legislation of a number of jurisdictions are expressly made summary offences only. Additionally, an offence would normally only be committed after notice of some kind. In other words, an organisation is most unlikely (in the absence of negligence) to commit an indictable offence accidentally.